Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2012

Leadership is a behavior, not a position

FOUR QUARTER CASE LAW UPDATES

John W. Bizzack, Ph.D.
Commissioner

Leadership Branch

J.R. Brown, Branch Manager
859-622-6591 **JamesR.Brown@ky.gov**

Legal Training Section

Main Number **859-622-3801**
General E-Mail Address **docjt.legal@ky.gov**

Gerald Ross, Section Supervisor
859-622-2214 **Gerald.Ross@ky.gov**

Carissa Brown, Administrative Specialist
859-622-3801 **Carissa.Brown@ky.gov**
Christy Cole, Office Support Assistant
858-622-3745 **Christy.Cole@ky.gov**

Kelley Calk, Staff Attorney
859-622-8551 **Kelley.Calk@ky.gov**
Thomas Fitzgerald, Staff Attorney
859-622-8550 **Tom. Fitzgerald@ky.gov**
Shawn Herron, Staff Attorney
859-622-8064 **Shawn.Herron@ky.gov**
Kevin McBride, Staff Attorney
859-622-8549 **Kevin.McBride@ky.gov**
Michael Schwendeman, Staff Attorney
859-622-8133 **Mike.Schwendeman@ky.gov**

NOTE:

General Information concerning the Department of Criminal Justice Training may be found at http://docjt.ky.gov. Agency publications may be found at http://docjt.ky.gov/publications.asp.

In addition, the Department of Criminal Justice Training has a new service on its web site to assist agencies that have questions concerning various legal matters. Questions concerning changes in statutes, current case laws, and general legal issues concerning law enforcement agencies and/or their officers can now be addressed to docjt.legal@ky.gov. The Legal Training Section staff will monitor this site, and questions received will be forwarded to a staff attorney for reply. Questions concerning the Kentucky Law Enforcement Council policies and those concerning KLEFPF will be forwarded to the DOCJT General Counsel for consideration. It is the goal that questions received be answered within two to three business days (Monday-Friday). Please include in the query your name, agency, and a day phone number or email address in case the assigned attorney needs clarification on the issues to be addressed.

KENTUCKY

PENAL CODE – KRS 508 – ASSAULT

Turner v. Com., 2012 WL 4327667 (Ky. 2012)

FACTS: On August 5, 2010, Westfelt was in a car with Carton, Osborne and Turner. Carton was driving. An argument ensued and Westfelt was beaten and abandoned, later getting a ride home from a passerby. He went to the ER and had X-rays, it was determined that three facial bones were broken. He was referred to a specialist but never went. He did go to the Bell County Sheriff's office to report the assault, also noting that his wallet was gone, containing over $800.

All three men were arrested. Turner was indicted on robbery, but on the morning of the trial, that charge was amended to Assault 2nd. Turner stated right before trial that he did not wish to testify against Turner, who was "family." He took the stand and gave testimony that "differed sharply from the statement given at the sheriff's office," putting all the blame on Carton and Osborne. When the inconsistency was brought up, he stated he'd been "high on drugs" at the time.

Osborne testified that Turner initiated the attack and that he and Carton had simply tried to stop it. Turner was convicted and appealed.

ISSUE: Is the question as to whether an injury is serious for the jury to decide?

HOLDING: Yes

DISCUSSION: Turner first argued that he should have received a jury instruction as to Assault 4th, and the Court agreed, as Turner was entitled to instructions "on the whole law of the case." The Court noted that the question of whether Westfelt suffered a serious physical injury was a question for the jury. He testified that his injuries were not life-threatening and healed completely within a couple of weeks. Since the Court denied the Assault 4th instruction, it necessarily concluded, on its own, that Westfelt's injuries were serious, as well.

The decision of the Bell Circuit Court was reversed.

PENAL CODE – KRS 508 - WANTON ENDANGERMENT

Gibson v. Com., 2012 WL 5629087 (Ky. App. 2012)

FACTS: On December 31, 2010, Deputies Phillips and Moore (Muhlenberg County SO) went to Gibson's home on a welfare check, at the request of Gibson's son. Gibson told the officers he had only a teenage daughter, not a son and asked them to leave.

The deputies contacted his son and told him that "Gibson was fine, but was acting slightly irrationally." (He also claimed to be a Cherokee chief and that his property was a federal reservation.) His son told the deputies that Gibson "had fallen off his rocker." The deputies went to Gibson's ex-wife's home, where the teenage daughter (Renee) was staying and both she, and the son, "expressed concern over Renee returning to Gibson's home."

The deputies then sought a mental inquest warrant, and were instructed by the County Attorney to go back and speak to Gibson more. They were warned by the son that Gibson "had several guns in the house." Trooper Knight accompanied them to the house, where Gibson came outside and asked about his daughter. He also told the officers that they were harassing him, and that Ken American was "trying to steal his coal and that he heard miners underneath his property." The told Gibson that he needed a mental evaluation but he ordered them off the property. He ran inside, stating he had a gun; the officers took cover. Gibson came out with a pistol, fired it twice and then then returned to the house. He emerged with a "long gun" and fired it once, against retreating to the house and turning off all the lights. The officers, who had retreated, called for backup.

Sheriff Perry arrived and spoke to Gibson through a loudspeaker; Gibson said he was not coming out. Gibson's brother and daughter both spoke to him through the loudspeaker and he still refused to come out. Sheriff Perry told him they would be coming in, to which Gibson told him to bring "some damn body bags." He told Gibson they would use teargas and eventually, they did so. Unfortunately, a couch in the basement caught fire. Gibson escaped and tried to hide, but was caught with a pistol and two long guns.

Gibson was eventually convicted of three counts of Wanton Endangerment, and appealed.

ISSUE: Is firing a gun in close proximity to someone wanton endangerment?

HOLDING: Yes

DISCUSSION: The Court looked to the statute and noted that the commentary even gave as an example that "firing a weapon in the immediate vicinity of others is the prototype of first degree wanton endangerment." The officers testified that they were in fear for their lives and that they took cover. Even accepting he did not fire at the officers, the Court noted the danger of ricochet. The Court upheld his conviction.

PENAL CODE – KRS 508 – CRIMINAL ABUSE

Allen v. Com., 2012 WL 483898 (Ky. App. 2012)

FACTS: In April, 2007, Allen moved in with Buchanan (a co-defendant). Buchanan had a 2-year-old child, Braden, that lived with them. Allen gave birth to Kaylee in 2008. On July 14, 2008, Allen went back to work, leaving the infant in the care of a sitter for several hours each afternoon, for several days. On July 20, they went to a campsite where the baby was seen to be happy and normal. Late that evening, while Allen was tanning, she heard Buchanan putting Braden to bed, and then hear Kaylee give what was "not a normal cry." She did not investigate but about 30 minutes later, Buchanan came to her with Kaylee, who "appeared limp and unresponsive." Allen, a CNA, began CPR and told Buchanan to call 911 and his mother (who lived nearby). Help arrived, including a firefighter, who took over CPR. A responding paramedic found the baby with a slight pulse, not breathing and he could not get an oxygen level. She improved at the hospital, however.

At the hospital, the doctor was given little explanation for her condition. She was moved to Lexington where the doctor found she had swelling in the brain. She was diagnosed with shaken baby syndrome, traumatic brain injury or inflicted head injury. She also had a fracture in her leg which was 7-10 days old, which was later classified as "bucket handle" injury caused by yanking.

On July 24, she was pronounced dead. The MEs testified that the injury occurred soon before she collapsed. Allen was convicted of Criminal Abuse 3d for the leg injury and Complicity to Manslaughter for her death, for failing to protect her from Buchanan. Allen appealed.

ISSUE: Does holding a parent equally responsible by manslaughter committed by a third party require a parent to have known that the child was at risk?

HOLDING: Yes

DISCUSSION: The Court noted that at the time the leg injury occurred, Allen was Kaylee's primary caregiver. Her explanations for the leg injury were inconsistent, and neither of her explanations for the injury was feasible. As such, it was proper for the jury to find her to blame for the injury.

With respect to the Manslaughter charge, the Court noted that the evidence of the injury was "massive and non-accidental." But it did not find any indication that Allen should have realized that Kaylee was at risk of injury from Buchanan. At the time Kaylee cried, Allen was "clearly indisposed" and believed to be in the care of her father. As such, the Court agreed it was not proper to convict her of Manslaughter and reversed the conviction.

PENAL CODE – KRS 511 - BURGLARY

Williams v. Com., 2012 WL 5627875 (Ky. App. 2012)

FACTS: On August 30, 2010, Williams and Turner drove to Maysville. They got lost and ended up at Doyle's home, and "eventually went inside." While they were there, a school bus driver went by; two of the bus passengers resided in the Doyle home. They noted the strange car in the driveway. Eventually, the bus driver and the occupants returned and went inside, finding Williams and Turner, who fled in their vehicle. The house "was in a state of disarray, with drawers and closets open and items strewn about on the floor." A computer and jewelry had been moved.

Armed with a license number, the police quickly identified the vehicle as belonging to Williams's mother. Both Williams and Turner were identified by photopak and arrested.

While in custody, Williams made a statement to Deputy Dodge. He moved for suppression of that statement, arguing he was impaired at the time, but the trial court denied the motion. He was convicted of Burglary and appealed.

ISSUE: May burglary be inferred from circumstances?

HOLDING: Yes

DISCUSSION: First, with respect to the question as to whether his entry constituted burglary (since in fact, they were not successful in committing a crime), the Court agreed that the way the vehicle was parked (backed in with trunk open) and the condition of the house (ransacked), reasonably indicated that Burglary was the appropriate charge.

The Court also reviewed whether his confession could be considered involuntary due to his stated intoxication. The trial court had noted that while Williams may have been under the influence of drugs, he clearly "responded appropriately and without delay" to questioning and was coherent. He was "alert and oriented." There was no indication that he was hallucinating or was otherwise untruthful.

Williams also argued that he invoked his right to counsel. The questioning was recorded and the Court noted that he specifically denied asking for an attorney, when a statement was questioned by the deputy. The court noted that although he "initially appeared to invoke his right to counsel, he unequivocally answered in the negative when Dodge asked if he wanted an attorney."

Williams' conviction was affirmed.

Hall v. Com., 2012 WL 528948 (Ky. 2012)

FACTS: On February 11, 2011, at about 0030, Barbourville PD got a report of a prowler at a local business. Officers Tye and Lawson, along with Trooper Bunch (KSP) responded. They found a truck, with the tailgate down, backed up near one of the darkened buildings. Two entered, finding Hall, "laying [sic] on the floor under an object with his hands and face hidden." He came out when ordered. Trooper Bunch later stated that Hall was not asleep and "he seemed unhappy." The building was used to store angle iron valued at about $10 a pound. Several pieces were stacked near the door on top of a generator and had had obviously just been placed there, due to the disturbance in the dust. Hall was arrested and volunteered he'd been given permission to go into the building and get iron to scrap, but he "did not identify" who had given him the alleged permission.

Hall was indicted for Theft and Burglary 3d, as well as PFO. He was convicted of Burglary and Attempt-Theft. He then appealed.

ISSUE: May a person's presence inside a building, and other circumstances, be used to support an inference of burglary?

HOLDING: Yes

DISCUSSON: Hall argued that there was no evidence that he intended to commit a crime inside the building The court agreed that the evidence was sufficient for a jury to so find, and upheld the Burglary conviction.

PENAL CODE – KRS 513 - ARSON

McWain v. Com., 2012 WL 5969629 (Ky. App. 2012)

FACTS: McWain, and a co-defendant, were charged with Arson and Burglary. Although McWain pled guilty, he argued that his trial attorney did not properly investigate the crime because, a KSP trooper reported the victim said that there was no "living person" in the house at the time of the fire. The Court refused to consider his assertion and McWain appealed.

ISSUE: Must a building actually be occupied for Arson 1st?

HOLDING: No

DISCUSSION: The Court noted that Arson 1st does not require that a building actually be occupied, only that it "may be" so occupied. The Court noted that "residential dwellings or buildings are presumptively inhabited." The Court affirmed McWain's guilty plea.

PENAL CODE – KRS 514 – RECEIVING STOLEN PROPERTY

Jordan v. Com., 2012 WL 5627264 (Ky. App. 2012)

FACTS: On September 9, 2009, an ATV was stolen from Strong, in Scott County. When he called to report it, he learned that it had already been recovered. A witness had recognized that the ATV was stolen and tracked the truck that had been involved with it to Jordan's home. The witness, Northcutt, later identified Jordan "as the person he saw with the ATV." (The ATV had fallen off the back of a pickup, driven by Jordan.) Another witness, Norton, also identified Jordan. Norton, in fact, apprehended Jordan after a brief chase, during which he seized the truck keys and told Jordan he was calling 911. Jordan ran from the scene, but Norton picked Jordan from a photo array. (A deputy sheriff had arrived after Jordan escaped, but had been unable to locate him that night, but he did seize both the ATV and the pickup truck, which was registered to Jordan.)

Jordan called the deputy and tried to place the blame on another individual, Josh, to explain how he came into possession of the ATV. He stated he did not know it was stolen until it fell from the truck. He stated that he called his girlfriend to explain his predicament, and she advised him to get Josh out of his truck. He claimed that he was afraid that men who Josh claimed were chasing him were now after him, and that he parked in Norton's yard to avoid them, hiding in the back of the truck. He claimed he fled the scene because he didn't think the police would believe him, as he was on probation. Ultimately he was told to come in and give a statement, but he did not do so until later that day.

Jordan was ultimately arrested for Receiving Stolen Property. As he was awaiting trial, he "jokingly" offered a family member of the person he was staying with $2,000 to testify to something that would discredit Norton's statement. Over objection, this was heard by the jury.

Jordan was convicted and appealed.

ISSUE: May possession of an item shortly after it is stolen be used to infer knowledge that it is stolen?

HOLDING: Yes

DISCUSSION: Jordan first argued that there was "only a possibility that he had knowledge that the ATV was stolen" and intended to keep it from the owner. The Commonwealth countered that there was no dispute that he was in possession of the stolen ATV and that the decision was to the jury. The Court noted that under KRS 514.110(2), ""The possession by any person of any recently stolen movable property shall be prima facie evidence that such person knew such property was stolen." There was no question that he was in possession of it immediately after it was taken and that it was in his truck.

With respect to the bribery, for which he was not charged, the Court noted that once the Commonwealth was made aware of the statement, it notified the court and the defense that it intended to use it as KRE 404(b) evidence as consciousness of guilt. The Court, however, noted that in O'Bryan v. Com., the "basic rule that evidence of uncharged conduct is inadmissible."[1] However, it might be admitted, as follows:

> Evidence of the commission of crimes other than the one charged is admissible if, (1) it is offered to prove motive, intent, knowledge, identity, plan or scheme, or absence of mistake or accident; (2) such evidence is relevant to the issues other than proof of a general criminal disposition, and (3) the possibility of prejudice to accused is outweighed by the probative worth and need for the evidence.

In this case, the Court agreed that evidence of the attempted bribe was properly admitted, as the "courts have held that evidence that a witness has been threatened or otherwise influenced in an attempt to suppress his testimony is admissible in a criminal prosecution only where the threat was made by, or on behalf of, the accused."[2] Further, a showing of such attempts tends to "show guilt."[3] Such evidence is "routinely" found "to be more probative than prejudicial."

The Court affirmed his conviction.

PENAL CODE – KRS 520 - ESCAPE

Davidson v. Com., 2012 WL 5305732 (Ky. App. 2012)

FACTS: In 2008, while serving a jail sentence on weekends, Davidson failed to return to the Crittenden County Detention Center as required. He was indicted for Escape. Davidson moved to dismiss, arguing that his failure to report did not constitute Escape but was, at most, a probation violation. When the motion was dismissed, Davidson took a conditional guilty plea and appealed.

ISSUE: Is a failure to return to jail when ordered an escape?

HOLDING: Yes

DISCUSSION: The Court looked to the statutory definition and agreed that the failure to return to the jail, as required, did meet the definition of Escape 2nd.[4] The Court upheld Davidson's plea.

[1] 634 S.W.3d 153 (Ky. 1982).
[2] Campbell v. Com., 564 S.W.2d 528 (Ky. 1978).
[3] Foley v. Com,, 942 S.W.2d 876 (Ky. 1996), citing Collier v. Com,, 339 S.W.2d 167 (Ky. 1960).
[4] Land v. Com., 366 S.W.3d 9 (Ky. App. 2012).

FORFEITURE

Cooper v. Com., 2012 WL 5457507 (Ky. App. 2012)

FACTS: Cooper pled guilty in 2011 to a charge of Trafficking, DUI and other charges. At his final sentencing, the Commonwealth requested forfeiture of property in his possession at the time of the arrest, specifically a Night Vision Monocular. At a hearing on the matter, the arresting deputy (Ballard County SO) explained the circumstances of the arrest, which occurred after a controlled buy had been made from Cooper. The monocular was in a bag sitting next to the drugs in question. He agreed that the monocular was likely not used in the transaction, which took place during daylight hours, but that his experience suggested that such equipment was used to conduct counter-surveillance. Cooper testified he did not use the monocular for that purpose but was, in fact, returning it to his brother, from whom he'd borrowed it. The trial court agreed it had likely not been used in the transaction at bar, but that it was properly subject to forfeiture under KRS 218A.410(1)(f) as an item "which could be used to deliver, import or export controlled substances." Cooper appealed the forfeiture.

ISSUE: May items (other than cash) be presumed to be proceeds of drug trafficking for purposes of forfeiture?

HOLDING: No

DISCUSSION: The Court looked to the statute, which presumes that "all monies found in close proximity to controlled substances of activities or equipment related to drug manufacturing or distribution are subject to forfeiture." There is, however, no such presumption for other property. The Commonwealth must "prove a nexus between the property sought to be forfeited and its use to facilitate a violation of KRS 218A.[5] The Court agreed that there was insufficient evidence to prove that the monocular was, in fact, linked to the crime in question, the connection was "simply too tenuous to support the inference required."

The Ballard County decision was reversed.

DUI

Ogle v. Com., 2012 WL 5627566 (Ky. App. 2012)

FACTS: On September 11, 2009, Ogle was driving in Fayette County when he collided with another vehicle, driven by Yanko. Two others witnessed the collision and went to assist. Reed, one of the witnesses, approached Ogle and was under the impression that he was intoxicated. Both of the drivers were injured and transported, but because neither was believed to have life-threatening injuries, a "full investigation

[5] Osborne v. Com., 839 S.W. 2d 218 (Ky. 1992).

was not performed at the scene." The positions of the vehicles was documented, however, and photos taken.

Ogle's blood was drawn by a nurse, who noted that Ogle "appeared intoxicated" and was "belligerent and uncooperative." The blood vial was marked and sent to the lab via pneumatic tube. The vial was opened and tested for alcohol, which came back at .259. A urine screen tested positive for oxycodone and marijuana. Ogle was treated for multiple fractures. Other medical records indicated that treating personnel believed him to be "grossly intoxicated." Yanko had numerous fractures and was sent to surgery. He died, ultimately from a pulmonary embolism and cardiac arrest.

Lexington police arrived to investigate the possible DUI. (Apparently they were unaware of his intoxication at the scene because he was bleeding facially.) He admitted to having had multiple beers, but apparently refused an official blood test. When Yanko died, a further accident reconstruction was done. The investigator also asked that the hospital blood be secured pending a warrant, and it was ultimately taken to the KSP lab. At the lab, the alcohol concentration was found to be .24, but they could not test for drugs due to the sample size. Ultimately, the sample was destroyed pursuant to the lab's procedures.

Ogle was charged with Manslaughter 2nd. He was convicted and appealed.

ISSUE: May hospital blood tests be used as evidence?

HOLDING: Yes

DISCUSSION: Ogle argued that there were numerous problems with the chain of custody of the hospital blood sample, because "there was no formal documentation of how the blood changed hands, and who placed the blood in the pneumatic tube." The court noted that a perfect chain of custody is not required.[6] It is only important that "there is persuasive evidence, by a reasonable probability, that the evidence has not been altered in any material respect." Any "gaps in the chain of custody go to weight of the evidence rather than to its admissibility." In this case, the Court found no reason to believe that it was, in fact, altered in any way, and it was handled the way such samples typically are, as part of normal hospital procedure.

With respect to the destruction, Ogle argued that the test results should be excluded "because the lab unnecessarily destroyed the blood sample."[7] However, the Court noted that in this situation, Ogle was provided with information about the test. Further, Kentucky has adopted the rule in Arizona v. Youngblood[8] that "that there is no denial of due process absent a showing of bad faith on the part of law enforcement or the Commonwealth where law enforcement or the Commonwealth have failed "to preserve evidentiary material of which no more can be said then that it could have been

[6] Rabovsky v. Com., 973 S.W.6 (Ky. 1998).
[7] Green v Com., 684 S.W.2d 13 (Ky. App. 1984),
[8] 488 U.S. 51 (1998).

subjected to tests, the results of which might have exonerated the defendant."[9] As there was no showing of bad faith, the Court agreed the results were properly admitted.

Ogle also argued it was improper to admit the showing of the urine screen done by UK hospital, because neither of the drugs was in his blood at the time. The Court agreed it was improper as it was irrelevant, but further noted that it was harmless error in the face of the overwhelming evidence that he was intoxicated.

Finally, Ogle argued that it was improper to admit "investigative hearsay" given by several of the officers. In several instances, officers mentioned what they had been told by other officers. The Court agreed that "many of the statements are hearsay" because "they go to the truth of the matter asserted whether Ogle's car crashed because he was intoxicated." However, the Court agreed the error was harmless because the "testimony in question was cumulative of other properly admitted evidence."

Ogle's conviction was affirmed.

Ferguson v. Com., 362 S.W.3d 341 (Ky. App. 2012)

FACTS: On April 19, 2009, Trooper Maupin (KSP) stopped Ferguson's vehicle in Carroll County; it lacked tail lights. After a FST and PBT, she was arrested for DUI. On the way, she used her cell phone to call her roommate, who'd been with her in the car, with the trooper's permission. At the jail, her purse, with the cell phone inside, was confiscated. She was given her implied consent rights, during which time she learned she could try to contact an attorney prior to the Intoxilyzer. As she has an attorney, she asked to contact him, but she told the trooper that her attorney did not have a landline, only a cell phone, and his number was in the phone. The Deputy jailer said that the jail's policy prohibited the use of the phone, instead, she only had access to a collect-call phone on the wall. As she could not recall the attorney's number, she was unsuccessful in contacting him.

Ferguson registered a result of .092 on the Intoxilyzer. She moved for suppression of the results in District Court, which was denied. She took a conditional guilty plea and appealed. The Circuit Court affirmed and Ferguson further appealed.

ISSUE: May a subject under arrest for DUI be permitted to use their cell phone for the purpose of contacting an attorney?

HOLDING: Yes

DISCUSSION: The Court looked to Bhattacharya v. Com.[10] and KRS 189A.105(3) for guidance. In the former, the Court agreed that Bhattacharya was denied his right to contact an attorney when he was provided with a telephone directory. The arresting officer insisted the Bhattacharya read the numbers he wanted to have dialed and the

[9] Collins v.Com., 951 S.W.2d 569 (Ky. 1997).
[10] 292 S.W.3d 901 (Ky. App. 2009).

officer dialed them. (Bhattacharya was unsuccessful in reaching an attorney through the two numbers he requested.) The court noted that "in today's technologically advanced society, many people store important contact information in their cell phone." It noted it was not unreasonable to expect that subject be given access to a cell phone "for the limited purpose of procuring an attorney's phone number or contacting said attorney." The Court noted that certainly the trooper and deputy jailer could monitor her use of the phone to obtain the number, and in fact, they could have even dialed the number, once found, for her. (The Court recognized that some cell phones may not be able to accept reversed charges or collect calls, and in such case, she would need access to a phone that would, in fact link with the number she dialed.)

The Court discounted the fact that she could have tried to contact the attorney while in the transport vehicle, noting that she did not receive her implied consent rights until she arrived at the jail.

Ferguson's plea was reversed and the case remanded.

JUVENILE

E.M. v. Com., 2012 WL 3629022 (Ky. App. 2012)

FACTS: On November 12, 2010, a juvenile complaint was filed by E.M.'s school, for her violation of KRS 630.020(2) – for being "beyond control of the school." An attached report detailed her disruptive behavior and profanity. She was summoned to school and a juvenile status offender order was entered, ordering that she have no behavior problems or violations of the law. During that same time frame, E.M. was admitted to a mental health facility so the case was continued. By February, 2011, she had been released and re-enrolled in school and the case was continued. On April 7, during a court review, it was reported that she'd been charged with assaulting a teacher. The Court reminded her that she was still under the court order. At a June hearing, it was disclosed that she'd been in another incident and again, the case was continued.

On June 9, E.M. was before the court for a pretrial conference and was told she was also facing contempt of court charges. She was adjudicated on June 22 and appealed.

ISSUE: Must a status offense complaint regarding school include an indication of the intervention strategies used?

HOLDING: Yes

DISCUSSION: E.M. argued that the Family Court did not have jurisdiction to handle the status offense, asserting that KRS 600.020(4) required that the school attach documentation as to "all intervention strategies" to the initial complaint. The Court noted that the complaint did include a report of the incidents and the school's intervention strategy in response.

At the hearing, several school staff and a social worker testified as to the behavior issues with E.M., who had the opportunity to cross-examine each of them. The court noted that a brief mention of a prior status offense was not prejudicial, as the trial judge was already personally aware of it.

The adjudication against E.M. was upheld.

DVO / FAMILY

Sitar v. Glover & Com. of Ky., 2012 WL 4857331 (Ky. App. 2012)

FACTS: On September 26, 2011, Glover took out a DVO on behalf of her minor child, A.B., alleging that Sitar had forced sex acts on the child. No specific dates were provided. He was variously marked as "former spouse" and "x-boyfriend" on the form. An EPO was issued. At the DVO hearing, Glover testified that her now-17 year old daughter, A.B., when between 12 and 15, was forced to engage in sex with Sitar. Glover testified that she had no personal knowledge of the incidents but that they had been reported to the police, who were investigating. The hearing was continued for 2 weeks until A.B. could testify, and she subsequently did state that she had been forced to have sexual intercourse and perform other sex acts. Sitar denied the allegations, claiming they were an attempt to keep Glover from marrying him. Glover, however, stated she believed A.B. The Court issued the DVO, looking at Sitar's prior criminal history.

Shortly thereafter, a criminal charge was filed, alleged he'd violating the no-contact provisions of the DVO. He moved to find the original petition flawed, because the relationship was described, variously, as former spouse and x-boyfriend. The Court upheld the petition and Sitar appealed.

ISSUE: Does prior sexual abuse, when the alleged perpetrator no longer lives with the victim, support a DVO?

HOLDING: Yes

DISCUSSION: The Court noted that the petition was actually filed for A.B.. The Court agreed the Glover was, no matter how it was listed, a member of an unmarried couple at the time, and that as such, A.B. was also protected. Further, despite his argument that there was no indication of imminent harm, as the acts had taken place several years earlier and the couple no longer lived together, the court agreed that sexual abuse of a minor was sufficient to issue the DVO.

Bowman v. Bowman, 2012 WL 5457332 (Ky. App. 2012)

FACTS: The Bowmans were married for nearly thirty years before they separated in January, 2009. In February, 2010, Rita Bowman requested an EPO against Timothy Bowman. At the time, they were involved in a divorce. At the DVO hearing, the Court

heard from the Bowmans and Timothy Bowman's sister, Lois. Rita described threatening letters and noted he was prone to violence when not taking his medication for PTSD. Timothy denied all allegations and said that some text messages were taken out of context. Lois testified that Rita had never told her of any physical threats during the marriage.

The court issued a DVO and Timothy appealed. The Court did not issue a formal finding of facts but did note certain facts on the docket sheet.

ISSUE: Must findings of fact for a DVO be documented?

HOLDING: Yes

DISCUSSION: Timothy argued that Rita did not give sufficient evidence to support a DVO. The Court however, stated that it was clear that sufficient evidence had been considered by the Court and upheld the DVO.

SEARCH & SEIZURE – SEARCH WARRANT

Clark v. Com., 2012 WL 4857326 (Ky. App. 2012)

FACTS: On August 2, 2010, a Lexington PD detective used an "undercover profile" of a 14 year old girl "to interact with Clark in an online computer chat room." Clark asked "her" a number of questions and expressed a desire to have sex with her. "She" also said that she lived in a particular neighborhood and agreed to meet him. The officers set up surveillance in that area, looking for the vehicle that Clark said he drove. They spotted another vehicle, driving around the "designated meeting spot," "driving in a manner consistent with the 'directions' given by the profile." The vehicle drove between two parking lots several times and parked "at least six times plus entered into the profile's 'neighborhood' at least twice." Clark's was the only vehicle, and he the only person, in the lot and during that time, Clark was instant messaging to decide on a meeting place at the golf course.

As Clark pulled out of the lot, he was pulled over and "coincidentally, the 'chatting' between Clark and the profile ceased." The officer saw two laptops, an air card and a power cord from the cigarette lighter. He was asked out of the car, handcuffed and secured in the cruiser. He was told he was "being lawfully detained" and that his car would be towed. He was taken to the station and interviewed, but not given Miranda rights. He was told that he was free to leave, but continued to speak with the police, admitting he'd been chatting with the girl. He was given his rights and the detective who had been posing as the girl began asking questions. Clark argued that "the statements he had made prior to being given his Miranda rights were referenced throughout the police interview."

Clark was arrested and charged with Prohibited Use of Electronic Communication (KRS 510.155). A search warrant was used on his vehicle, and the computers were seized.

He moved for suppression of the evidence and the statements he made to the police. The Court ordered his "pre-Miranda statements made at the golf course and at the police station be suppressed." In addition, finding that the statements made after the Miranda warnings were "not differentiated," the Court ordered those suppressed as well. Clark allegedly also requested counsel, which was not respected, but the Court ruled that "he had not made an unambiguous and unequivocal invocation of his right to counsel." But with respect to the search warrant, the court ruled that even without the use of the statements, it was sufficient "independent evidence to support a finding of probable cause." The Court denied the motion with respect to the search warrant.

Clark took a conditional guilty plea and appealed.

ISSUE: Must a defendant prove that a warrant contains reckless or false statements, and that those statements made a difference, to overturn the warrant?

HOLDING: Yes

DISCUSSION: On appeal, Clark continued his argument "that improper statements were relied upon in the issuance of the search warrant" and that the evidence should have been suppressed. The Court agreed that the statements were taken improperly and that suppression of the statements was required. However, the Court noted that under Hayes v. Com.[11], Clark would have to prove that "(1) the affidavit contains intentionally or recklessly false statements, and (2) the affidavit, purged of its falsities, would not be sufficient to support a finding of probable cause." The Court noted that the trial court clearly "purposely and meticulously reviewed the affidavit." The affidavit detailed the chat between the parties and how Clark's actions matched the chat, and disagreed that the fruit of the poisonous tree doctrine applied. The Court ruled that "the evidence from an independent source was the primary basis for the issuance of the search warrant."

The Court declined to rule upon his argument that he twice requested counsel, because it noted that the remedy (the suppression of the statements) would have been no different. The Court affirmed Clark's plea.

SEARCH & SEIZURE – CONSENT

Dowdy v. Com., 2012 WL 4761510 (Ky. App. 2012)

FACTS: Trooper Pervine received a complaint that Dowdy, a convicted felon, owned a weapon. They went to Dowdy's residence in Graves County and asked him. He replied his mother owned a rifle, but that he did not. They went to his mother's home and asked, and she "said she had one and led them back to the bedroom." She pulled an empty rifle box from under the bed, but then admitted she'd bought it for

[11] 320 S.W.3d 93 (Ky. 2010).

Dowdy to go deer hunting, and that he had the rifle. They returned and asked him for the rifle. He retrieved the rifle and turned it over to the trooper.

He was charged with being a Convicted Felon in Possession. He moved for suppression and was denied. Dowdy took a conditional guilty plea and then appealed.

ISSUE: Is producing an item upon request done voluntarily?

HOLDING: Yes

DISCUSSION: Dowdy argued that he did not give consent when he produced the weapon, as the trial court had ruled. The Court looked to Schneckloth v. Bustamonte and agreed that the consent was voluntary and not as the result of "any coercive action whatsoever."[12]

The Court upheld Dowdy's plea.

Com. v. Brooks & Garland, 2012 WL 6062752 (Ky.App. 2012)

FACTS; On May 24, 2011, Det. Farmer (Louisville Metro PD) received a tip from a CI that Garland was selling drugs. He did surveillance and "saw an apparent drug transaction between a female occupant of the home and a passenger in a silver Saturn." He did a traffic stop and with consent, found 9 hydrocodone pills in her purse. She (and her husband, also in the car) admitted she'd gotten the pills from Garland. Det. Farmer went to the Garland house with 7 other officers to do a "knock and talk." They found several people on the porch and when they approached, with badges showing, "an unidentified male ran from the porch into the home." The officers pursued and secured him. Det. Farmer obtained consent from Houchens, the homeowner, to search.

During the search, everyone was secured and sequestered. They found a purse in the basement, with pills and cash – the purse belonged to Garland. Apparently the basement was later considered a separate apartment, but it is not clear it was recognized as such at the time. Brooks and Garland were indicted for Trafficking and related charges.

Both Brooks and Garland moved for suppression. The Court agreed the basement search was valid, but not the search of the purse, and suppressed the evidence. The Commonwealth appealed.

ISSUE: May a homeowner give permission to search a purse that doesn't belong to them?

HOLDING: No

[12] 412 U.S. 218 (1973).

DISCUSSION: The Court noted that "it is axiomatic that absent exigent circumstances, law enforcement officers may not enter an individual's private residence in order to conduct a warrantless search."[13] The Court agreed that the homeowner consented and that the search of the basement was proper. The Court, however, found no exigency in the search of the purse, which did not belong to the homeowner. (The assertion that there might be a "hidden danger or weapon" in the purse was discounted, as Garland, and everyone else, was secured in another room at the time.)

The Court distinguished the situation from that discussed in other cases raised by the Commonwealth. In this case, the Court characterized it as a "third-party consent" situation, as in Colbert v. Com.,[14] but in Colbert, the property was owned by the suspect's mother. But in this case, the Court found it difficult to extend Houchens' permission to a closed purse that did not belong to her.

The Court upheld the suppression of the items found in the purse.

SEARCH & SEIZURE – CURTILAGE

Cruz-Vasquez v. Com., 2012 WL 4760914 (Ky. App. 2012)

FACTS: On March 20, 2010, Officers Gray and Lain (Richmond PD) were on foot patrol in a mobile home park. After finishing their patrol, the took a short cut between two mobile homes and Officer Gray saw Cruz-Vasquez "manipulating items" he believed to be cocaine and a plastic bag. Although the blinds were drawn, the officer could see inside through a small gap. The officers approached and knocked. Cruz-Vasquez opened the door, still holding the bag. As they questioned him, Cruz-Vasquez dropped the bag and stepped back inside; the officers grabbed and handcuffed him. Officer Lain did a sweep, finding no one. They confirmed the bag was cocaine and arrested Cruz-Vasquez. The officers obtained a search warrant and found more drugs and paraphernalia.

Cruz-Vasquez was charged with Trafficking and Possession of Drug Paraphernalia. He moved for suppression on the basis of an illegal search. The Court denied the motion. Cruz-Vasquez took a conditional guilty plea and appealed.

ISSUE: Is the land around a mobile home generally considered curtilage?

HOLDING: No

DISCUSSION: The Court noted that generally, "a home and its surrounding curtilage are protected by the Fourth Amendment."[15] Curtilage extends "to the area immediately surrounding a dwelling house." In this case, the Court applied the Dunn[16]

[13] Payton v. New York, 445 U.S. 573 (1989).
[14] 43 S.W.3d 777 (Ky. 2001).
[15] U.S. v. Dunn, 480 U.S. 294 (1987); Quintana v. Com., 276 S.W.3d 753 (Ky. 2008).
[16] Supra.

factors and agreed that the area from which the officers could see inside the mobile home was not enclosed, was open to the public access and was unconnected to any "intimate activity" in the home. The only factor that supported the area being curtilage was the distance from the home.

The Court also agreed that the officers' entry to seize Cruz-Vasquez and the plastic bag were appropriate under exigent circumstances, as they reasonably believed he would destroy it. The Court noted that although they did confirm that the white substance in the bag was cocaine by field-testing, that did not negate the "intrinsically incriminating" nature of the evidence.

His plea was upheld.

Burd v. Com., 2012 WL 5289418 (Ky. 2012)

FACTS: On June 18, 2010, Det. Wimpee (KSP) learned that Burd was manufacturing methamphetamine at his home. He learned the next day that Burd was the subject of an outstanding warrant for violating parole conditions. He went to the home, with other officers, to arrest him. At the rear of the home, Dets. Wimpee and Drummond found a camping fuel can and an acetone can sitting on top of a garbage can. From his place in the yard, he also saw marijuana growing in pots nearby. When they received no answer at the door, officers went to get a search warrant, but others remained at the scene believing, in fact, that someone was there.

About an hour later, Det. Wimpee returned with a warrant, and additional assistance. The door was forced open and inside, they found Burd, his wife and another adult. Det. Wimpee detected the smell of chemicals. When asked, Burd directed them to the kitchen and a glass jar, and additional items connected to manufacturing methamphetamine. Processed methamphetamine was found in the house.

Burd was eventually convicted Manufacturing Methamphetamine, Possession of a Controlled Substance and related offenses. Burd appealed.

ISSUE: Are officers allowed to enter the curtilage to secure the back door during an arrest warrant execution?

HOLDING: Yes

DISCUSSION: Burd argued, first that the warrant was based on information obtained in violation of his reasonable expectation of privacy and false or misleading statements. He argued that the items spotted by Det. Wimpee in the rear of the house were as a result of an illegal search of the curtilage. The court looked to McCloud v. Com., in which the issue was virtually identical.[17] The court noted that "because law enforcement officers are authorized to secure the backdoor by accessing the backyard, any illegal activity (or reliable evidence thereof) taking place in plain view of the

[17] 279 S.W.3d 162 (Ky. App. 2007).

backyard may be identified in an affidavit in support of a search warrant without violating the suspect's reasonable expectation of privacy."

The Court also agreed that Det. Wimpee stated, affirmatively, that he could see and identify the marijuana plants, based on his training and experience.

The Court upheld Burd's conviction.

SEARCH & SEIZURE - TERRY STOP

Merriweather v. Com., 2012 WL 6651882 (Ky. App. 2012)

FACTS: On April 20, 2009, Merriweather allegedly stole Hale's cell phone. She called the phone and the person who answered demanded money for it and directed her to an intersection in Hopkinsville. She called the police, and Officer Tedford, among others, went to the meeting place. They had Hale call the phone as they watched Merriweather leave a house nearby, while talking on a phone. They approached him and Officer Tedford took the phone – discovering it was, in fact, Hale's phone.

Merriweather was arrested and searched. The officer also found crack cocaine, cash and rolling papers. Officer Pollard went to the nearby house and smelled marijuana. They obtained a warrant, and eventually found additional drug evidence. Merriweather was indicted on a variety of charges and ultimately convicted of Possession of a Controlled Substance only. He then appealed.

ISSUE: Is a stop based on an individual being the only likely suspect in an area lawful?

HOLDING: Yes

DISCUSSION: Merriweather argued that all items seized should be suppressed, arguing the "initial stop" was illegal because there were not enough facts for an arrest at that time. The court looked to the facts and found it was objectively reasonable for Officer Tedford to believe that Merriweather, the only person on the street at the time, was the person who had the stolen phone. The Court agreed the conviction was proper.

Merriweather also argued that since he was convicted only of possession, allowing forfeiture of the cash found on his person was improper. The Court noted that a conviction for trafficking was "not required to show money found in close proximity to drugs" to make the cash subject to forfeiture. The Court found that all that was required was "slight evidence of traceability" and that the Commonwealth met that burden for a forfeiture. Merriweather's claim that the money was from "gambling and work" was not enough to offset the assertion.

The Court affirmed the conviction, but did remand for sentencing changes.

SUSPECT IDENTIFICATION

Butcher v. Com., 2012 WL 6213785 (Ky. App. 2012)

FACTS: On August 19, 2010, Officer Hill was on patrol in Lexington, near UK, when he saw a vehicle roll through a stop sign. He followed the vehicle, which was speeding and not making full stops. Officer Hill ran the plate and learned it was stolen. (The officer later testified that he was going 60 mph, in a 25 mph zone, and couldn't close on the vehicle.) Finally, the vehicle crashed and Officer Hill saw a suspect running from the crash. He radioed out a description. Officer Jones and Darro, his K-9, arrived and Darro picked up a scent. He eventually tracked Butcher to where he was hiding nearby and he was arrested.

Bucher was charged with Receiving Stolen Property, Fleeing and Evading, Reckless Driving and related traffic offenses. He was tried and convicted, but that initial case was overturned. He was convicted a second time and appealed.

ISSUE: Is it enough that a suspect generally fits a description to justify a stop?

HOLDING: Yes

DISCUSSION: Butcher argued that it was a case of mistaken identity and that he was wearing clothing different than that put out by Officer Hill. He also claimed he was much thinner than the suspect described. The Court agreed that the suspect Officer Hill saw and described "generally fit the physical description" of Butcher. The Court noted that the discrepancies (whether the shirt was dark blue or black, or his hat white or light gray) were for the jury to decide.

The Court upheld Butcher's conviction.

INTERROGATION

Jackson v. Com., 2012 WL 5463903 (Ky. App. 2012)

FACTS: In 2007, Jackson was living in a faith-based recovery home in Barren County. On August 17, 2007, the pastor contacted the Barren County SO and informed them that "child pornography was on the home's computer" and that residents had reported seeing Jackson looking at t. Det. Anderson was able to access the photos using Jackson's password.

Jackson was contacted at his workplace. He was asked to come to the Sheriff's Office and offered a ride, because he did not have a car. Jackson agreed to go, but later stated that at the time, he was not aware that he was the subject of the investigation. When they arrived at the station, he was told the reason for the questioning and given

his Miranda warnings. He signed a waiver. He later stated that when he learned that the images had been found, he "did not feel free to leave." They had "conversation" about the situation, and "Jackson made some admissions" after about an hour. When the detective stated he wanted to start recording, Jackson said "I think I might want an attorney." (Jackson stated he "explicitly asked for an attorney.") The Detective testified that he said that was fine, and was Jackson's right, and got up to leave, but also said that "we are just trying to help you, if you don't want help, that's fine." Jackson then said he did not want an attorney. He was given his rights again and admitted he was responsible for the images. Even though it was recorded, Jackson maintained that he was offered a two year sentence (rather than ten years) if he admitted it, but the detective denied having made the offer.

Jackson moved for suppression and was denied. He took a conditional guilty plea to 50 counts of Possession of Matter Portraying a Minor in a Sexual Performance. He then appealed.

ISSUE: Does telling someone about incriminating evidence, while they are voluntarily at the police station, make the situation custodial?

HOLDING: Yes

DISCUSSION: Jackson argued that he was in custody at the time he made incriminating statements and that he had properly invoked his right to counsel. The Commonwealth argued that he was not in custody and that no matter what, his request for counsel was not unequivocal. The Court looked to the custody determination, reviewing the factors necessary to make the decision. The factors include:

> (1) The purpose of the questioning; (2) whether the place of the questioning was hostile or coercive; (3) the length of the questioning; and (4) other indicia of custody such as whether the suspect was informed at the time that the questioning was voluntary or that the suspect was free to leave or to request the officers to do so; whether the suspect possessed unrestrained freedom of movement during questioning; and whether the suspect initiated contact with the police.[18]

"In addition, the inquiry into whether Jackson was in custody turns on whether a reasonable person in a similar situation would have believed that he or she was free to leave."[19] In this case, the Court agreed that once informed as to what had been found, Jackson would reasonably believe he was not free to leave. Nothing indicated that he was told otherwise. However, since he was given his Miranda warnings, the Court agreed it really did not matter if he was in custody or not. The Court noted that reviewing the trial court's findings was complicated "because the findings are sparse." However, it concluded that the trial court was in a better position to determine "which testimony was credible."

[18] U.S. v. Salvo, 133 F.3d 943 (6th Cir. 1998).
[19] Thompson v. Keohane, 516 U.S. 99 (1995).

With respect to his invocation of counsel, the court noted that Jackson's testimony and Det. Anderson's testimony were "quite different." The Court accepted the trial court's decision that Det. Anderson stopped the interview when Jackson suggested he might want an attorney.

The Court noted that once a suspect invokes, the two park test in Oregon v. Bradshaw[20] and Smith v. Illinois[21] applies. First, the Court was required to determine if the accused actually did invoke the right to counsel, and then determine whether "(a) the accused 'initiated further discussion with the police' and (b) under the totality of the circumstances, the accused voluntarily, 'knowingly and intelligently waived the right he had invoked.'" The Court agreed that he did, in fact, invoke his right to counsel and that once he changed his mind, he waived Miranda and gave a statement.

Jackson also argued he was coerced into a confession by a promise of a lesser sentence, which Det. Anderson denied. He agreed that he offered to help Jackson, but not that he made a specific promise. The court agreed Anderson did not do so

The Court affirmed the denial of Jackson's motion to suppress.

INTERROGATION – MENTAL ILLNESS

Keeling v. Com., 381 S.W.3d 248 (Ky. 2012)

FACTS: Keeling is a paranoid schizophrenic. On May 27, 2004, he approached Morefield, who was doing yard work, and asked for a lighter. Morefield had never seen him before. As Morefield reached for a lighter, Keeling stabbed him in the chest. The next day, his father told his mother that the police were looking for Keeling. Keeling and his father, also schizophrenic, fought several times over the night and Keeling ultimately also stabbed his father in the chest. He died from his injuries. Keeling was captured and admitted to both stabbings.

Over the next six years, Keeling was ruled incompetent to stand trial. In 2009, he was ruled competent. Ultimately he was found guilty but mentally ill for the murder and the assault. He appealed.

ISSUE: Does mental illness automatically make a statement inadmissible?

HOLDING: No

DISCUSSION: Among a multitude of other issues, Keeling argued that his post-arrest statements to police should have been suppressed due to his mental illness, which caused hallucinations and delusions. The court agreed that under Colorado v.

[20] 462 U.S. 1039 (1983).
[21] 469 U.S. 91 (1984); See also Smith v. Com., 920 S.W.2d 514 (Ky. 1995).

Connelly, a subject's mental condition is a factor in determining whether a confession is voluntary.[22] It ruled, however, that "although a defendant's mental illness can be considered in determining whether law enforcement coerced a confession—for example, by exploiting the mental illness as in Blackburn v. Alabama[23] and Bailey v. Com.[24] it is not, without some official coercion, sufficient for suppression purposes. The Court noted that in Bailey, the subject was mildly mentally retarded, but that Keeling was of average intelligence. The Court reviewed the recording of the questioning and found "absolutely no evidence of coercion, psychological or otherwise." The Court agreed that although he may not have been able to properly judge what was going on, there was no evidence that the police exploited his mental illness. The Court noted that his objections to being held under guard, in the same clothes he's been wearing at the time of the murder of his father, which were blood-stained, did not constitute coercion. Although he argued he received no medication or visitors, the Court noted that he was not prescribed any medication at the time, nor did anyone attempt to visit him.

Keeling's conviction was upheld.

TRIAL PROCEDURE / EVIDENCE – COURTROOM

Fairchild v. Com., 2012 WL 5969624 (Ky. App. 2012)

FACTS: In August, 2008, "Fairchild began a series of text messages someone he thought was his girlfriend," that included explicit photo. In fact, the messages were from his girlfriend's 13-year-old daughter, sent with her mother's approval.[25] Later that day, Fairchild picked up the two and they went to an isolated area where Fairchild attempted sexual intercourse with the daughter. (The daughter later stated he engaged in oral sex with her at another time, as well.)

Fairchild was interviewed by a detective and gave a statement. He was "assured … he was free to leave and that he was not going to be arrested." He gave a statement similar to what was described, although he characterized the girlfriend and daughter as the aggressors.

Fairchild was indicted for Rape and Sodomy. He took a conditional guilty plea, but then rescinded it when they could not agree on a penalty. He was convicted of Unlawful Transaction with a Minor, Sodomy 2nd and Sexual Abuse, but the trial court merged the Sexual Abuse with the Unlawful Transaction conviction. Fairchild appealed.

ISSUE: Does a defendant have a right to see their accusing witness?

HOLDING: Yes

[22] 479 U.S. 157 (1986).
[23] 361 U.S. 199 (1960).
[24] 194 S.W.3d 296 (Ky. 2006)
[25] The girlfriend was upset because he would not leave his wife.

DISCUSSION: Fairchild argued that it was improper to utilize a video system to allow for witness testimony, and that the system did not allow Fairchild to see the accuser. The Court noted that the physical layout of the courtroom prevented someone sitting at the defense table from seeing the witness, and that a video monitor was regularly used to allow the defense attorney (and defendant) to see the witness. The Court agreed that in Star v. Com., which arose in the same courtroom, and in which it agreed that the layout created a Confrontation Clause issue.[26] However, in this case, the Court agreed that the error was harmless in that there was no indication that the lack of ability to view the witness affected the case.

The Court also agreed that Fairchild was not in custody during his initial interview, which took placed in an unmarked car in Fairchild's driveway. Unbeknownst to Fairchild, the interview was recorded. Although the detective may have lied to Fairchild during the interview, those lies were not impermissibly coercive.

Fairchild's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – SPOUSAL PRIVILEGE

Meyers v. Com., 381 S.W.3d 280 (Ky. 2012)

FACTS: Meyers' trial for possession of a firearm was severed from a number of other charges, for which he was tried separately. Prior to the trial, he moved to prohibit his wife, S.C., from testifying pursuant to KRE 504(a) – the spousal testimonial privilege. The Court ruled she could testify under an exception, however. At trial, she testified that Meyers took a firearm from a friend's home. He later told S.C. that "he planned to draw police fire by shooting at them." Gilliland called S.C. to try to diffuse the situation and Meyers answered, telling Gilliland he was "on the run and was going to make the police shoot at him."

Meyers subsequently turned himself in and admitted to Det. Jessup (unidentified Hickman County agency) that he'd taken the weapon, and that he'd discarded it in a field near where he was captured.

Meyers was convicted and appealed. S.C. testified in the sentencing phase about his possession of the firearm. The Court of Appeals upheld the conviction and he further appealed.

ISSUE: Is it proper to allow a spouse to testify?

HOLDING: No (but see discussion)

[26] 313 S.W.3d 30 (Ky. 2010).

DISCUSSION: Meyers argued that it was improper to allow S.C. to testify. The Court looked to KRE 5.04 and noted that "a party has a privilege to prevent his or her spouse from testifying against the part as to events occurring after the date of their marriage." There is an exception, however, if the spouse is "charged with wrongful conduct against the person or property of … the other." Because the firearms charge was, in fact, severed from other charges that would be wrongful conduct about S.C., the Court agreed that the simple possession charge was not against her or part of the same proceeding, even though it happened at the same time.

The Court agreed it was improper to allow her to testify but ruled that the error was harmless, as the testimony occurred in the sentencing phase and did not impact his conviction. Meyers' conviction and sentence were upheld.

TRIAL PROCEDURE / EVIDENCE – VENUE

Rippetoe v. Com., 2012 WL 6651165 (Ky. 2012)

FACTS: Rippetoe was convicted of manufacturing methamphetamine in Russell County. He appealed.

ISSUE: May venue be inferred from testimony?

HOLDING: Yes

DISCUSSION: Rippetoe argued that there was no direct testimony that the crime occurred in Russell County. The Court noted, however, that in Com. v. Cheeks, it had "generally been held in this state that it is not necessary to show by direct evidence that the crime occurred in the county of prosecution, but the fact may be inferred from evidence and circumstances which would allow the jury to infer where the crime was committed."[27] The Court noted that Russell County deputy sheriffs were dispatched to the scene and that several other witnesses placed the crime in the area of Russell Springs and that was sufficient to prove venue.

Rippetoe's conviction was upheld.

TRIAL PROCEDURE / EVIDENCE – SPOLIATION

Perry v. Com., 2012 WL 6649197 (Ky. 2012)

FACTS: Marcum and Perry were involved in a traffic collision in Martin County. Perry's vehicle was determined to have drifted into the other lane, striking Marcum's vehicle head-on. Marcum was killed and his passenger, Crum, was seriously injured. Det. Russell (KSP) determined that Perry was intoxicated, apparently on pills. He was later found to have hydrocodone (Lorcet – in this case), alprazolam (Xanax) and

[27] Com. v. Cheeks, 698 S.W.2d 832, 835 (Ky.1985) (citing Giley v. Com., 133 S.W.2d 67 (1939)).

carisprodal (Soma) in his system; all three of the drugs were in fact legally prescribed to him. "While individually each of the drugs tested within therapeutic levels, evidence was presented that when taken together, the drugs could act in combination so as to make it unsafe for someone to drive." Perry also admitted to having smoked marijuana earlier the same day.

Following the crash, his vehicle was secured by the police. An order was entered to preserve both vehicles, but a month before trial, the garage storing the vehicle "allowed it to be crushed."

Perry was indicted for Wanton Murder, Assault 1st and DUI. He was convicted of Manslaughter 2nd rather than Wanton Murder, however. Perry appealed.

ISSUE: Is all missing evidence exculpatory?

HOLDING: No

DISCUSSION: Perry next argued that because the vehicle was destroyed, he was entitled to either a suppression of the testimony of the accident reconstructionist or a missing evidence instruction. The Court looked to Illinois v. Fisher, in which the issue of the right to have exculpatory evidence in the hands of the state be preserved or disclosed was discussed. The Court noted that in "failure-to-preserve cases, the defendant must also be able to show both that the missing evidence "possess[ed] an exculpatory value that was apparent before the evidence was destroyed" and that he was "unable to obtain comparable evidence by other reasonably available means."[28] To make out a due process violation in such instances, Perry would have to show "(1) that the State acted in bad faith in failing to preserve the evidence; (2) that the exculpatory potential of the evidence was apparent before its destruction; and (3) that the evidence was, to some extent, irreplaceable." In this case, the Court found no bad faith, but instead, negligence on the part of the garage owner. Any exculpatory value in actually examining the truck, rather than using photos, was "purely speculative." In addition, the destruction took place only a month before trial, and the defense counsel had yet to avail himself of the chance to opportunity to inspect the vehicle. The court further agreed that such an instruction was not warranted by a loss due to "mere negligence."

Perry also objected to the trial court allowing Det. Russell to testify to the significance of the bluish-green residence he saw on Perry's nostrils and tongue. The trial judge agreed that every Eastern Kentucky officer knew the significance of such residue, and supporting testimony indicated the Lorcet pills are green or blue. The Court agreed that such testimony based on training and experience, while different than standard expert testimony, is properly admitted as opinion testimony when the trial court finds the officer qualified.

[28] California v. Trombetta, 467 U.S. 479 (1984).

Perry also argued, first, that Crum's injuries were not sufficiently serious so as to satisfy the element of Assault 1st. The proof indicated that she suffered a badly broken ankle and that she was, even at the time of trial, facing additional surgery. She could bear no weight for three months after the crash. The Court agreed it was sufficient for a serious physical injury.

Perry's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – FINDINGS OF FACT

Hill v. Com., 2012 WL 6632818 (Ky. App. 2012)

FACTS: Hill was charged with multiple offenses in Fayette County. He moved for suppression, arguing he was not fully advised of his Miranda rights and that he was coerced into a statement. At the hearing, Det. Brotherton testified that Hill was a victim in a shooting as well as a suspect in break-ins. They entered his home (with consent) and were recording the conversation from the beginning. They immediately went over the Miranda warnings. They conversed at the kitchen table for less than half an hour. He admitted involvement in a robbery. He agreed to go with the officers to the station but on the way to the cruiser, he decided "he did not want to go to jail and began to run." He was captured and arrested. He was given Miranda again and questioned. His second statement did not differ materially from the first, only providing more detail.

Det. Brotherton admitted that they did not repeat the Miranda warnings at the house, however, "when they transitioned to the discussion about the robberies and assault cases." Hill argued that he was not properly Mirandized "because his rights were only mentioned in conjunction with the crime of which he was a victim." The Commonwealth argued that he knew he was a suspect and that in fact, there was no duty to Mirandize at all since he wasn't in custody.

Ultimately, he took a conditional guilty plea to several counts of robbery. He then appealed.

ISSUE: Must factual findings for a judicial decision be rendered?

HOLDING: Yes

DISCUSSION: Hill argued, among other things, that the trial court failed to issue written findings of facts and conclusions of law in the denial of the motion to suppress, only issuing the order orally. The court noted that RCr 9.78 requires that factual findings for the denial be entered into the record. Although oral statements are acceptable, the Court must put sufficient findings into the record to allow for a meaningful review. In this case, the Court made only a conclusory statement, not a factual finding.

The Court vacated Hill's plea and the case was remanded back for factual findings.

TRIAL PROCEDURE / EVIDENCE – RIGHT TO PRESENT DEFENSE

Green v. Com., 2012 WL 4743039 (Ky. App. 2012)

FACTS: Green allegedly sexually abused his girlfriend's 8 year old daughter during the summer of 2007, in Kenton County. (At the time, the child thought he was her biological father.) At the trial, he tried to introduce the record of an "alternative perpetrator" – the child's paternal uncle, a registered sex offender. The court refused to allow admission of the uncle's records, through the investigating detective, but did not address how the records might be introduced otherwise. Green was unable to provide any evidence as to motive and opportunity against the uncle.

Green was ultimately convicted and appealed.

ISSUE: Must all evidence suggested an alternative perpetrator be allowed?

HOLDING: No

DISCUSSION: The court agreed that a defendant has the right to present evidence of an alternative perpetrator.[29] However, in this case, the "uncle's motive was weak," and there was no evidence of his opportunity to commit the abuse. The victim had only recently met the uncle and had been in his presence no more than twice. Specifically, there was no indication of the uncle's underlying sexual offense that resulted in his inclusion on the registry.

The Court agreed it was proper to exclude the information and upheld Green's conviction.

TRIAL PROCEDURE / EVIDENCE – MUG SHOTS

Johnson v. Com., 2012 WL 6649190 (Ky. 2012)

FACTS: Johnson checked his brother, Tony, into a Louisville motel, paying the bill for a week. On the day Tony was to check out, motel employees heard a gunshot and found Tony's body lying on the bed. Evidence was collected, including surveillance video that captured Johnson entering and leaving the room. He later admitted the visit but denied murdering his brother. (Apparently no gun was found at the scene.) During the investigation, a witness placed Johnson at Cox's Park, on the Ohio River, and eventually, a firearm was located in the river at that location. It matched the evidence found at the scene. Johnson objected, among other things, to his mug shot being introduced at trial.

Johnson was convicted and appealed.

[29] Harris v. Com., 134 S.W.3d 603 (Ky. 2004); Beaty v. Com., 125 S.W.3d 196 (Ky. 2003).

ISSUE: Is a booking photo always admissible?

HOLDING: No

DISCUSSION: Johnson argued that it was improper to introduce his mug shot. A detective testified that he obtained the photo to compare it to the person entering and leaving the motel. Johnson objected as it implied that he had a criminal record, but that objection was overruled. A little later, a booking photo taken around the time of the murder was shown to the detective to explain the difference in his appearance, Johnson had gained weight. Again the Court permitted it.

The Court agreed that using a mug shot may "have a damaging effect" on the defendant because it infers they have been involved in criminal action. To introduce a mug shot, the Court must weigh the probative value against the prejudicial effect. The three prongs of the assessment include that the prosecution must have a demonstrable need to introduce the photo, it must not be implied that the defendant has a criminal record and the manner of its introduction must not "draw particular attention to the source or implications of the photograph." In this case, the Court agreed there was a reason to use it, to show why the detective identified Johnson and the photo was not clearly recognized or identified as a booking photo

The Court affirmed Johnson's conviction.

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

Mullins v. Com., 2012 WL 6649199 (Ky. 2012)

FACTS: On April 9, 2009, Damron was shopping at the Pikeville Wal-mart with her young daughter. She encountered Mullins several times during the trip; Mullins greeted her and then followed her. Finally, wielding a steak knife, Mullins stabbed Damron multiple times in the thigh before being tackled by a witness. Det. Reed (Pike County SO) arrived and took custody of Mullins. He discovered Mullins had the knife and a pair of scissors, both of which she'd taken from the store. Damron, who was pregnant, was taken to Lexington for further evaluation and her wounds treated. She was released the next day.

Mullins was charged with Assault 1st and PFO. She was found guilty but mentally ill and appealed.

ISSUE: Is medical testimony essential to prove the seriousness of an injury?

HOLDING: No

DISCUSSION: Mullins argued that the injury Damron suffered was not a "serious physical injury" under KRS 500.080(15). The Curt noted that no medical experts

testified, only Det. Reed and Damron. However, the Court noted that it was considering the statute under the "substantial risk of death," as there was no indication that Damron did, in fact, suffer any prolonged loss or impairment. She did, however, testify to scarring and persistent sensation in the injury. The Court noted that although medical testimony is preferred, lay testimony could be used, and that the testimony, particularly about the quantity of blood lost, was sufficient to indicate a substantial risk of death from the injury. The Court further agreed that her advanced pregnancy also factored into consideration of the seriousness of her injuries. The court noted that past decisions supported the "contention that the fact that Damron's injuries were not *more* serious than they actually were does not mean there was not a substantial risk of death created by Mullins's aggressive attack."

The Court upheld her conviction.

Webb v. Com., 387 S.W.3d 319 (Ky. 2012)

FACTS: On July 31, 2009, Webb ran his car into the side of the Bourbon County Detention Center. Deputy Jailer Barkley and Pretrial Officer Mason were present and in fact, Barkley was trapped by the vehicle. Mason intervened to protect Barkley. The driver got away but Barkley recognized the driver as Webb. Deputy Jailer Hanson followed the vehicle and eventually apprehended Webb, who threatened to kill Hanson.

Webb was indicted for Attempt Murder and PFO. Prior to the trial, Webb's counsel moved to exclude "any and all statements conveying [Webb's] reputation as a 'violent inmate.'" Further, the Court agreed that testimony about him being a former inmate would only be permitted "for identification purposes." The Court did allow testimony about the death threat to Deputy Jailer Hanson.

Webb was convicted and appealed.

ISSUE: May threats be used to prove intent?

HOLDING: Yes

DISCUSSION: Webb sought to exclude testimony by Det. Primm that Webb was a "known 'violent inmate'" – which occurred after the court had ruled that no witness could call Webb "violent" but had not yet ruled on characterizing him as a former inmate. The Court had admonished the jury that any reference to Webb as a former inmate was not to be used in determining guilt. The court agreed that under KRE 401, it was highly relevant that Barkley and Mason recognized Webb. Further, under KRE 403, the Court agreed that "proper identification of the perpetrator, and laying the proper basis for doing so, is a key piece of the Commonwealth's case-in-chief" and allowing the jury to hear the full story of the crime was not unduly prejudicial to Webb.

Finally, the Court agreed that the threat to Hanson was "part of the incident in question," not a separate offense, and that testimony was relevant. The Court agreed that under

KRE 403, “Given that this threat was made only minutes after Appellant drove his car into the Bourbon County Detention Center and Barkley, and happened while he was fleeing the scene of the crime, it can fairly be considered to be part of the crime itself - or, more accurately, part of the *res gestae*[30]*.”* Webb had agreed that evidence of his flight from the scene was admissible, and the “threat was a part of the flight.” The Court noted that “crimes often have a set of surrounding circumstances which help shed light on aspects such as motive and intent.” The Court noted that “it has long been a rule in this jurisdiction that threats… of a crime are probative of the defendant's motive and intent to commit the crime ….”[31] Although “in this situation the threat was not made to the victim of the crime, but under the circumstances of the case, it was nevertheless probative of motive of intent. If *prior* threats are admissible, and not "unduly" or "unfairly" prejudicial, threats made *during* the course of the crime itself are also admissible.”

The Court upheld his convictions but the case was remanded for sentencing changes.

Turner v. Com., 2012 WL 6061713 (Ky. App. 2012)

FACTS: On August 24, 2009, following a court appearance in an unrelated matter, Turner was taken into custody in Laurel County. Deputy Guidi searched him and found methamphetamine. Turner was charged and went to trial on the drug offense on January 11, 2011. He requested suppression of any evidence as to why he was in court, and the judge agreed that although the jury needed some context, they did not need to know why he was in court on the day the search was done.

However, when called to testify, the deputy testified that it was a “regular pretrial day – criminal day.” The Court sustained an objection to the deputy’s statement but denied a requested mistrial. The court offered to admonish the jury, which was refused, and instructed the Commonwealth to explain the matter to the deputy. He was convicted and appealed.

ISSUE: Does a brief mention suggesting a defendant’s prior criminal history require a mistrial?

HOLDING: No

DISCUSSION: Turner argued that he was entitled to a mistrial because of the deputy’s testimony. The Court, however, disagreed, and noted that Turner rejected the offer of an admonition. The court noted that the brief reference “did not necessarily imply that Turner himself was before the court on a criminal charge.”

The Court upheld the conviction.

[30] *Res Gestae* is an exception to the hearsay rule and refers to those statements made naturally, spontaneously and without deliberation during the course of an event.
[31] Sherroan v. Com., 142 S.W.3d 7 (Ky. 2004) (citing Richie v. Com., 242 S.W.2d 1000 (Ky. 1951)): See also Davis v. Com., 147 S.W.3d 709 (Ky. 2004).

Davis v. Com., 2012 WL 5289407 (Ky. 2012)

FACTS: After conflict over a woman, Davis shot and killed Allen in Louisville. He was taken into custody and questioned by Det. Downs. He was charged with Murder and related offenses. The woman in question, Owens, testified on Davis's behalf, claiming that she was afraid of Allen, but evidence was introduced to the contrary.

Davis was convicted and appealed.

ISSUE: May a witness give an opinion on the credibility of another witness?

HOLDING: No

DISCUSSION: Davis argued that in the video of his interview with Det. Downs, she is often seen to be agreeing with him, and appeared to be sympathetic. The Commonwealth had elicited testimony from the detective that she "often lied to suspects as an investigative tool in order to make them feel more comfortable and speak more candidly." She agreed that she sometimes suggested a "theory about what happened" to the person she's questioning. The Court noted that a witness "may not give an opinion as to the credibility of another witness."[32] When the Commonwealth, on re-direct, moved into the area of eliciting testimony as the detective's belief as to whether Owens actually feared Allen, the Court noted that she "was essentially permitted to testify that Owens was lying." Although the Court agreed that "the prejudicial effect of having a police detective testify that another witness is lying far outweighs any probative value" as only the jury may assess credibility of witnesses.

However, the Court noted that the defense opened the door to the testimony and some of the testimony had already been had on cross-examination. As such, the Court agreed the admission of the evidence was harmless.

Davis's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – HEARSAY

Cunningham v. Com., 2012 WL 5274677 (Ky. App. 2012)

FACTS: In June, 2010, Sullivan witnessed an attack near her home. She called 911 and ultimately gave a statement, identifying the perpetrators as Gary Cunningham (Matthew Cunningham's brother) and Idol (Matthew's half-brother). Both men were arrested. While in jail in Maysville, Idol made 6 calls, some of which were to Matthew. As a result of these calls, Matthew Cunningham was arrested and convicted of Intimidating a Witness in a Legal Proceeding.

[32] Moss v. Com., 949 S.W.2d 579 (Ky. 1997).

During the subsequent trial, recordings of the calls were admitted, over objection. Excerpts were played and two witnesses were discussed, Sullivan and Brooks. Nine days after the calls, Sullivan was assaulted and threatened. Sullivan called the police Major O'Hearn was given a written statement about the threat and Sullivan was housed in protective custody that night, along with her child.

She later identified Matthew Cunningham as her assailant. He was convicted and appealed.

ISSUE: Are private phone calls testimonial?

HOLDING: No

DISCUSSION: Cunningham first argued that it was improper to admit excerpts from the tapes, because certain of the speakers were not present at trial. The Court noted, however, that it did not violate Crawford v. Washington[33] because such private telephone calls would not be considered to be of the sort that might later be used at trial. Such non-testimonial hearsay would be governed by the state's rules of evidence. The Court reviewed the text of the calls and noted that they showed that the three men involved "were aware of the witness list and names that were on it."

In addition, Sullivan had already testified that Matthew had threatened her. Further, the statements were not introduced to "prove the truth of the matter asserted" but instead, that Gary Cunningham and Idol had knowledge of the witness list and were putting the word out on the street for someone to do something about the witnesses against them. As such, the statements were properly admitted.

The Court affirmed Cunningham's conviction.

TRIAL PROCEDURE / EVIDENCE – CHILD WITNESS

Bagby v. Com., 2012 WL 6553406 (Ky. App. 2012)

FACTS: Bagby was charged with the Sexual Abuse of a 12-year-old girl, J.C., in Taylor County. J.C. testified at trial, via closed circuit, and was very upset during most of her testimony, crying and not facing the camera during some of her testimony. At the time she testified, she was 16.

Bagby was convicted and appealed.

ISSUE: May a victim who was under 12 at the time of the crime testify via closed circuit?

HOLDING: Yes

[33] 541 U.S. 36 (2004).

DISCUSSION: Bagby argued that it was improper to allow J.C. to testify via closed circuit. The Court reviewed KRS 421.350, which permits it under specific circumstances. In Danner v. Com.,[34] the Court had ruled that the statute applies when the victim was 12 or under, irrespective of their age when they testified. In this case, the court held a hearing during which testimony was taken concerning her ability to effectively testify in open court. The Court agreed that it was proper to allow her to testify on camera.

Bagby also argued that he was entitled to a missing evidence instruction, because Deputy Fink destroyed a recording of an interview with Bagby. However, Deputy Fink testified that it was virtually inaudible when he disposed of it. The Court agreed that the "intentional destruction of exculpatory evidence" warranted the instruction.[35] However, the Court considered this more of a "failure to create evidence …, rather than a failure to preserve exculpatory evidence."[36]

The court upheld Bagby's conviction.

TRIAL PROCEDURE / EVIDENCE – WITNESS

Nealis v. Com., 2012 WL 6061758 (Ky. App. 2012)

FACTS: On August 14, 2010, 5-year-old S.B. was with her grandfather, shopping at a Sharpsburg grocery. Boggess, a cashier, saw Nealis, approach S.B. as she was looking at a rack and "put his hand up the back of her dress."[37] He did it twice more, until the pair left the store. A worker went outside and told the grandfather what had been seen. Trooper Shortridge (KSP) responded and was told what happened. He went to Nealis's apartment to question him. He admitted touching S.B. but denied putting his hand in her dress.

Nealis was charged with Sexual Abuse 1st. S.B. was subjected to a hearing to determine if she was competent to testify. The Court found it borderline but agreed she was competent to testify. The Court also noted that there were adult witnesses to what occurred, also.

Nealis was convicted and appealed.

ISSUE: May a 5-year-old be considered competent to testify?

HOLDING: Yes

DISCUSSION: The Court reviewed KRE 601(b) providing for the qualification of

[34] 963 S.W.2d 632 (Ky. 1998).
[35] Coulthard v. Com., 230 S.W.3d 572 (Ky. 2007).
[36] Metcalf v. Com., 158 S.W. 3d 740 (Ky. 2005).
[37] She could see him via a parabolic mirror.

witnesses. The Court agreed that although she was not totally responsive, she "clearly perceived the matter about which she was testifying and had the capacity to recollect the facts about the day in question, she had the ability to express herself as to be understood, and she understood that she could get in trouble for lying." Her statements were consistent, for the most part. The Court agreed that she was competent to testify.

Nealis also argued that no sexual contact was proven nor that any physical contact was for the purpose of sexual gratification. The Court looked at KRS 510.110, which defines sexual contact. The Court agreed that in Bills v. Com., the Court had noted that 'sexual contact is not limited to the sex organ."[38] Intimate touching requires three factors: "1) what area of the body is touched; 2) what is the manner of the touching, and 3) Under what circumstances did the touching occur." The Court noted that Nealis looked around to make sure no one was watching when he touched S.B. He called her back to touch her again. The Court agreed that the jury's decision was proper.

TRIAL PROCEDURE / EVIDENCE – CHAIN OF CUSTODY

Damrell v. Com., 2012 WL 4327800 (Ky. 2012)

FACTS: Damrell was spotted riding an ATV on a public roadway by Trooper Pennington, who further testified that several items fell from a bag. Items in the bag, including a "one-step meth lab," were located. Trooper Pennington sent a sample of the contents of the container to KSP. Damrell was indicted in Rockcastle County for Manufacturing Methamphetamine, Possession of Methamphetamine, Operating an ATV unlawfully and Fleeing and Evading 2nd At trial, there was a question as to the lack of a signature on the KSP 41 chain of custody form, but at trial, the technician noted that the KSP 26 (testing) form was completed and signed. However, because that latter form was not provided prior to trial, it was suppressed under RCr 7.24. In addition, prior to trial, the physical evidence of the manufacturing was destroyed prior to trial.

Damrell was convicted and appealed.

ISSUE: Must a chain of custody be perfect?

HOLDING: No

DISCUSSION: Damrell argued that the evidence should have been suppressed due to the lack of adequate proof of chain of custody, The Court, however, noted that "it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that 'the reasonable probability is that the evidence has not been altered in an material respect."[39] In addition, with respect to the destruction of the evidence, the Court agreed that "absent a showing of bad faith, the Due Process Clause is not implicated by 'the failure of the State to preserve evidentiary material of which no more can be said than

[38] 851 S.W.2d 466 (Ky. 1993).
[39] Rabovsky v. Com., 973 S.W.2d 6 (Ky. 1998).

that it could have been subjected to tests, the results of which might have exonerated the defendant."[40] Nothing suggested bad faith and there was nothing to indicate that the destroyed material was exculpatory.

The Court affirmed Damrell's conviction.

Brown v. Com., 2012 WL 5630437 (Ky. App. 2012)

FACTS: On April 16, 2010, Dets. Dubree and Murphy, and Trooper Maxwell (KSP) went with Barkley, a social worker, to Brown's home in Monroe County. During a "knock and talk," Brown consented to a search. Det. Dubree found a piece of foil with methamphetamine. However, Brown was not actually arrested until January 6, 2011. When he went to trial, in June, Det. Dubree was on military deployment.

At trial, Barkley testified about what had occurred when the foil was located. Trooper Maxwell did as well, and also testified that Brown admitted it belonged to him. Sgt. Heller, the evidence officer, testified that Det. Dubree entered the foil into the evidence locker. A KSP chemist testified that the sample was methamphetamine.

Brown moved for a directed verdict and was denied. He was convicted and appealed.

ISSUE: Must a chain of custody be perfect?

HOLDING: No

DISCUSSION: On appeal, Brown argued that there was insufficient proof that the foil was the same foil collected by Dubree at the scene. The Court noted that he provided no proof that the disputed evidence was subject to tampering of any kind, nor that the foil recovered "was altered or replaced with some other material." The Court concluded that the testimony "adequately proved the authenticity of the foil."

Brown's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – SENTENCING

Reynolds v. Com., 2012 WL 5969635 (Ky. App. 2012)

FACTS: A Glasgow officer noticed Reynolds' wife, Melissa" "acting suspiciously inside a vehicle as Reynolds entered the vehicle." He had both step out. Melissa admitted she'd taken methamphetamine. Ultimately Reynolds was searched and methamphetamine found in his pocket. The officer learned Reynolds had a prior conviction for possession of a controlled substance so he was charged with a second offense. He took a conditional guilty plea. At the time Reynolds went to trial, a second offense was a Class C felony. However, Reynolds argued that the original offense was

[40] Estep v. Com., 64 S.W.3d 805 (Ky. 2002).

a misdemeanor and that the legislature did not intend to allow the enhancement in such situations. The Court denied his request and ruled that it was properly enhanced. Reynolds appealed his sentence.

ISSUE: May prior misdemeanor drug offenses be used to enhance a penalty?

HOLDING: Yes

DISCUSSON: The Court reviewed the statute and noted that in Jackson v. Com.[41] the Court had ruled that underlying prior drug offenses did not have to be felonies to be used to enhance future charges. The Court noted that the plain reading of the statute did not suggest it, either. Further, the Court noted that Reynolds was not entitled to new penalty schemes (that would reduce his sentence) because the statute in question did not come into effect until after he was sentenced.

Reynolds' plea was affirmed

TRIAL PROCEDURE / EVIDENCE – DISCOVERY

Wilson v. Com., 2012 WL 6061789 (Ky. App. 2012)

FACTS: On August 18, 2010, Officers Shelton and Hidrogo (Louisville Metro PD) began their shift at 2300. Officer Shelton was driving a pool car so he checked the car's interior, including pulling out the rear seat, for anything left behind. About 0100 the next morning, he and Officer Hidrogo were patrolling a local apartment complex (posted for No Trespassing) when they saw Wilson walking. They approached to talk to him and Wilson ran. The officers "took separate paths around the apartment buildings, meeting up next to a building entrance where they smelled a strong odor of marijuana coming from inside the foyer entrance doors; they located Wilson" inside behind a group of three men. Although confusion about the orders given to the men, both officers "agreed that Wilson exited the building past the officers using the group of three men as a screen." The officers chased him, with Wilson swinging a grocery cart and tripping Officer Shelton.[42]

The officers had to chase Wilson across Goldsmith Lane but the officers testified they encountered no traffic and crossed safely. Wilson was captured after he slipped "while tossing baggies of marijuana out of his pocket." He was handcuffed and searched, and more marijuana was found. Wilson was secured in Shelton's cruiser initially and then transferred to Hidrogo's car. "During the transfer, Officer Shelton noticed a small piece of sandwich baggie stuck in the rear bench seat where Wilson had been seated" – which contained a walnut sized (22g) chunk of cocaine.

[41] 319 S.W.3d 347 (Ky. 2010).
[42] Officer Hidrogo's citation did not mention this incident.

Wilson was charged. His defense counsel requested discovery of the audio/video of the cruisers and a list of individuals transported in Shelton's pool car in the 24 hours preceding the arrest. The order was issued, but the information was not provided by the time of the deadline. Wilson asked to have the case dismissed, but the court gave the Commonwealth an additional three days to comply. Finally, 19 days after the original deadline, Wilson's counsel was faxed a response providing almost no data except a list of Officer Shelton's arrests from Courtnet. In addition, the day before trial, the prosecutor told defense counsel that "there were no in-car audio/videos." Defense counsel argued that the information was not responsive, as it did not indicate everyone who may have been arrested by other officers using the pool car.

During additional discussion, the Court ruled that the Commonwealth had complied with the court order. During voir dire, the Commonwealth produced a log of the pool car usage but defense counsel argued it could not "simultaneously investigate the log" and "ethically defend Wilson" at the same time. A request for a continuance was denied because of an issue with Officer Shelton's schedule.

Wilson was convicted on Trafficking and related charges and appealed.

ISSUE: May a failure to produce discovery cause a conviction to be overturned?

HOLDING: Yes

DISCUSSION: Wilson argued that the discovery violation, including the delayed production of the pool car log, required that his conviction be overturned. The Court agreed that "an officer's statement that he routinely checks his patrol or pool cars for maintenance, safety, and the existence of any weapons or drugs is not conclusive evidence that the officer properly checked the patrol or pool car at issue." Since Officer Shelton and Officer Hidrogo had conflicting testimony on events, Officer Shelton's credibility was at issue. It was "prejudicial to Wilson for his counsel not to be able to investigate the 'pool' car's use log, despite her attempts to obtain a copy of it well before trial." The Court vacated Wilson's conviction and remanded the case.

TRIAL PROCEDURE / EVIDENCE – PRIOR BAD ACTS

Thacker v. Com., 2012 WL 3632349 (Ky. 2012)

FACTS: On July 16, 2010, Thacker shot Conn multiple times. He was charged with Assault 1st, as well as multiple counts of Wanton Endangerment for others in the house at the time. Thacker did not deny the shooting, but claimed he was acting under Extreme Emotional Disturbance (EED) and voluntary intoxication at the time.

Thacker was convicted, however, and appealed.

ISSUE: May a statement be admitted to prove state of mind, even if otherwise inadmissible because it shows a prior bad act?

HOLDING: Yes

DISCUSSION: At trial, Conn and other eyewitnesses all said that Thacker said, just prior to the shooting, that he was "going back to prison." The Court agreed to admit the statement as rebuttal to his claim of EED. Thacker argued it should have been excluded because it revealed a "prior bad act" under KRE 404(b) – that he'd been previously convicted of a crime. The Court agreed, however, that the statement was relevant as it showed Thacker's state of mind at the time, and that he was "mindful of the consequences of his actions and yet decided to shoot the victim anyway." It also showed that he was able to form the intent to commit a criminal act.

The court affirmed his conviction, but did remand for sentencing considerations.

CIVIL LITIGATION

Williams v. Butler, 2012 WL 5038331 (Ky. App. 2012)

FACTS: On July 7, 2007, Williams was found walking naked in the I-75 median in Kenton County. He was struck, tased and pepper-sprayed by officers Sandel, Fultz, Gilvin and Smith; he was finally arrested. He was convicted of Disorderly Conduct and eventually also pled guilty to Resisting Arrest and Wanton Endangerment.

Williams then filed a civil complaint against all the officers and the chief (Butler) for malicious prosecution, which was denied, on the basis of his guilty plea and convictions. Williams appealed.

ISSUE: Is a dismissal pursuant to a larger plea agreement a favorable termination to the accused?

HOLDING: No

DISCUSSION: The Court looked to the elements of malicious prosecution. To succeed, the plaintiff must show:

1) The institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings,
2) By, or at the instance, of the plaintiff,
3) The termination of such proceedings in defendant's favor,
4) Malice in the institution of such proceeding,
5) Want or lack of probable cause for the proceeding, and
6) The suffering of damage as a result of the proceeding.

In this case, the 3rd element was at issue. The Court noted that a plea is not a "termination favorable to the accused" in a malicious prosecution case. In this case, although the Court agreed to dismiss the Fleeing and Evading charge, the Court noted it was done as part of a larger plea agreement to which Williams accepted responsibility for other offenses.

The dismissal of the lawsuit was affirmed.

Sisco v. Com. of Kentucky (Justice and Public Safety Cabinet), 2012 WL 6214299 (Ky. App. 2012)

FACTS: On December 19, 2006, Sisco was seriously injured in Pike County as a result of Trooper Leonard (KSP) pulling out in front of him. Trooper Leonard was also killed. A subsequent investigation indicated Trooper Leonard was totally at fault. At the time, KSP did not maintain fleet vehicle insurance, but instead, troopers carried their vehicles on their own insurance.[43] Leonard's insurance carried offered to pay the limits on the coverage, $100,000. Sisco settled the claim with Leonard's estate, signing a release which did not mention any state or governmental entity, however. In 2007, he filed with the Kentucky Board of Claims. The claim was denied on the basis of the release signed earlier. Sisco appealed that decision to the Pike Circuit Court, which affirmed the ruling. He appealed, albeit untimely, claiming he did not learn about the ruling, but was denied. He appealed that denial.

ISSUE: May claims be made against KSP when a settlement is made with a KSP trooper's own insurance?

HOLDING: No

DISCUSSION: Sisco argued that since Leonard was totally responsible for the crash, that it was appropriate for the Board of Claims to allow him to recover damages from the state. He noted that no governmental entity was party to the contract entered into between Leonard's insurance carrier and himself, and further that KRS 44.070 clearly anticipated that a party might recover from multiple sources. However, the Court agreed that when Sisco released the primary tortfeasor, Leonard, that release "acted as a bar to any subsequent claim against the alleged secondary tortfeasor, the Commonwealth." Since explicit terms in the settlement did create that release, the Court agreed that he did release the Commonwealth as well.

The Court also agreed, however, that Sisco did make claims against KSP directly, for negligence and training deficiencies, and as such, the Court agreed that "he should be afforded the opportunity to develop his claim against KSP for negligence."

[43] The expense was reimbursed to the troopers.

MISCELLANEOUS

Com. v. Wilson, 384 S.W.3d 113 (Ky. 2012)

FACTS: On February 17, 2011, Cynthia Wilson claimed to be the victim of threats from Michael Wilson, her husband, and to have been physically assaulted. Wilson was charged with Assault 4th and a warrant issued by Jefferson County District Court. The next day, his attorney made an ex parte request from a different judge to set aside the arrest warrant and issue a summons warrant, instead, telling that judge that the victim had recanted. The warrant was withdrawn and a summons issued instead. The Commonwealth complained but was unsuccessful in getting the arrest warrant reinstated. Ultimately, Wilson pled guilty.

The County Attorney requested a certification of the law regarding whether it is appropriate for the defense attorney to make such ex parte requests of trial judges, without the opportunity for the Commonwealth to be involved.

ISSUE: May a defense attorney request a warrant be set aside ex parte?

HOLDING: No

DISCUSSION: The Court answered an unequivocal no to the question, noting that Supreme Court Rule 4.300, Canon 3B(7) prohibits it for any substantive matter. Once a warrant is issued, strict protections are in place. Allowing an attorney to present only one side to a judge places the victim, as well as the public, at risk.

The Court continued, noting that despite "courthouse culture," "one-sided contacts" are strictly forbidden and it is the judge's responsibility to ensure that it does not occur. Opposing parties must be given notice of any hearings, and have the opportunity to be heard.

The Court noted that "mutual respect is mandatory, not only for opposing counsel, but the interest they represent," and it was critical to maintain that trust between the two sides.

The Court certified the law.

In re: Com. v. Derringer, 386 S.W.3d 123 (Ky. 2012)

FACTS: Derringer was indicted on multiple charges, including PFO 2. That count was based on an earlier conviction for which he'd received diversion under KRS 533.250. He was still on diversion at the time of the indictment. Derringer argued for dismissal on the basis that he had not been "finally sentenced" on that early felony. The trial court agreed and dismissed the PFO 2. The Commonwealth requested a certification on the issue, as to whether it is proper to charge with PFO 2 when a person commits another crime while on diversion.

ISSUE: Is a diversion a final sentence?

HOLDING: No

DISCUSSION: The Court looked to the statute and noted that it requires a conviction on the earlier felony, along with other specific criteria. The Court noted, however, that one of the requirements is that a felony sentence be imposed, of a term of more than one year. The Court noted that pretrial diversion is not a sentence, but instead an "interruption of prosecution prior to final disposition." A true sentence comes only after the diversion has been revoked.

The Court agreed that an actual sentence, rather than diversion, is required for a PFO 2 charge.

SIXTH CIRCUIT

WIRETAP ORDERS

U.S. v. Sims, 2012 WL 6200261 (6th Cir. Mich. 2012)

FACTS: In May, 2004, a federal judge authorized the Detroit DEA to wiretap Flenory, "believed to be the head of the Black Mafia family." The agents intercepted multiple calls that led them to stop a vehicle on the way to Louisville that contained 10 kilos of cocaine and a cell phone that indicated a recent call to Toree. That same number had earlier been associated with Sims, whose calls with Flenory had previously been intercepted. The Detroit DEA notified the Louisville DEA and as a result, the Louisville DEA applied for a wiretap order for Sims' phone. On June 28, 2004, the agents detailed the investigation and obtained the order for a period of time; eventually they searched Johnson's home – she was Sims' girlfriend – which led to the discovery scales and drug ledgers. Sims was indicted on drug trafficking. He moved for suppression and was denied. He was convicted and appealed.

ISSUE: Does a wiretap order request require a showing that other investigative methods have been tried or would likely be unsuccessful?

HOLDING: Yes

DISCUSSION: The Court noted that a wiretap order under 18 U.S.C. §2518(1)(c) requires that an application detailing "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be dangerous." In U.S. v. Landmesser, the Court gave as a reason for what it termed the "necessity requirement) to "assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime" and to keep it from being "routinely used as the initial step in a criminal investigation."[44] The Court noted that "all that is required is that the investigators give serious consideration to the non-wiretap techniques prior to applying for wiretap authority and that the court be informed of the reasons for the investigators' believe that such non-wiretap techniques have been or will likely be inadequate."[45]

Sims argued that the warrant affidavit was insufficient as the wiretap was being used as an initial technique, that the affidavit did not "allege specific factual circumstances" that normal investigative techniques would be ineffective, and that a similar affidavit involving a co-conspirator had been ruled insufficient. The Court, however, noted that the affidavit did detail the previous investigation, prior to the involvement of the Louisville DEA office. (Specifically, they searched telephone records, ran a pen register and trap/trace and had done a trash pull.) The Court noted that the DEA did use

[44] 553 F.2d 17 (6th Cir. 1977).
[45] U.S. v. Alfano, 838 F.2d 158 (6th Cir. 1988).

boilerplate language and other information "copied nearly verbatim from other affidavits used in different cases," but that did not necessary render it insufficient so long as it also included "information about particular facts of the case at hand which would indicate that wiretaps are not being routinely employed as the initial step in criminal investigation." The affidavit thoroughly discussed the "reasons the affiant did not believe that specific unattempted investigative techniques – such as undercover agents, search warrants, tracking devices, grand jury subpoenas, and interviews of subjects – would be successful in this particular case." Finally, the Court noted that the other affidavit did not meet the requirement because it did not apply the boilerplate language to the facts of the case in which it was involved. In Sims' case, the Court concluded it did so and held the affidavit sufficient.

Sims also argued that he was entitled to a Franks[46] hearing as a result of inconsistencies in the affidavit, but after detailing all the purported issues, the Court disagreed, finding that none of the questioned paragraphs in the affidavit contained evidence of contradictions nor were they misleading. The Court agreed that there was sufficient probable cause connected to Sims, even though the phone was registered to someone other than Sims, as "it is common for drug conspirators to register their phones under different names." The Court agreed that the evidence indicated that Sims was using the phone and that was enough.

The Court affirmed Sims' conviction.

CONSTRUCTIVE POSSESSION

U.S. v. Lee, 2012 WL 4490837 (6th Cir. Tenn. 2012)

FACTS: In March, 2009, Nashville officers on patrol spotted "Lee park between two cars." There were people in both of the other cars. The officers approached and called his name, and Lee "quickly retreated to the back of his car and reached toward his waistband." The officer "heard metal hit concrete" and surmised Lee had dropped a gun. He saw, using a flashlight, that Lee tried to kick something, which then slid away. Another officer looked under the car and saw a pistol.

Lee was arrested. Sitting in the car, he was given Miranda and admitted the gun was his. His girlfriend, who owned the car, later testified she saw the gun in his possession earlier that day.

Lee, a convicted felon, was convicted for possession of the gun. He appealed.

ISSUE: Is testimony sufficient to prove constructive possession of an item?

HOLDING: Yes

[46] Franks v. Delaware, 438 U.S. 154 (1978).

DISCUSSION: Lee argued that there was no proof that he owned the gun in question. Even though no officer saw it in his hands, nor was it submitted for prints, his girlfriend testified to his possession of the gun. The Court agreed there was sufficient proof that he possessed the gun. The Court upheld Lee's conviction.

SEARCH & SEIZURE – SEARCH WARRANT

U.S. v. Hampton, 2012 WL 5382946 (6th Cir. Ky 2012)

FACTS: In March, 2009, German law enforcement detected an individual in the U.S. who was sharing images of child pornography. The information was referred to ICE, who traced the IP address to Hampton, in Louisville. On January 22, 2010, Agent Oberholtzer drafted a search warrant for Hampton's home and computer. Many items, including two computers and a hard drive, were seized.

Hampton was charged under 18 U.S.C. §2252 with receiving and possessing child pornography. He moved for suppression, which was denied. He took a conditional guilty plea and appealed.

ISSUE: Is evidence that is 10 months old necessarily stale?

HOLDING: No

DISCUSSION: Hampton argued that the warrant contained stale information, unsupported allegations and "general boilerplate recitations that were not specific to Hampton." Taking each in turn, the Court agreed that the affidavit contained information that was 10 months old. But whether information is stale "depends, in part, on 'the inherent nature of the crime.'"[47] Child pornography is not a "fleeting crime" and it was reasonable to believe that the collection would be valued and kept for a long period of time, in a secure place.[48] In addition, "child pornography can still be discovered on a computer's hard drive even after those images have been deleted."[49] The affidavit detailed Osterholtzer's investigation and the underlying circumstances that demonstrated probable cause. Further, in general, "another law enforcement officer is a reliable source and … consequently no special showing of reliability need be made as a part of the probable cause determination."[50] The Court found it appropriate to include information about the German investigation, which had been provided to ICE. Finally, the Court agreed that having gone to the effort of obtaining the illegal images it was reasonable to think Hampton would be "unlikely to destroy them," and that had been proved in the past.[51]

The court upheld the warrant and Hampton's plea.

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[47] U.S. v. Spikes, 158 F.3d 913 (6th Cir. 1998).
[48] U.S. v. Frechette, 583 F.3d 374 (6th Cir. 2009).
[49] U.S. v. Terry, 522 F.3d 645 (6th Cir. 2008).
[50] U.S. v. Lapsins, 570 F.3d 758 (6th Cir. 2009).
[51] This was referred to as the "collector profile."

U.S. v. Case, 2012 WL 5374119 (6th Cir. Tenn. 2012)

FACTS: In April, 2006, Det. Depew (Hawkins County SO, TN) obtained a search warrant for Case's home, for marijuana, morphine and other drugs. Deputies recovered a quantity of drugs as well as firearms, "including a machine gun." His income was determined to be under $10,000 a year. Knowing that often dealers took items in trade for drugs, he suspected a number of the items in the house "likely represented proceeds from drug sales." The officers seized the items and listed them on the warrant, separate from the drugs, paraphernalia and firearms. The next day, Case was served with a state forfeiture seizure notice for all of the personal property. At a state court hearing, the judge found probable cause supporting forfeiture of the items. Case initiated an appeal of the ruling but eventually waived his right to appeal.

Case began to cooperate with the officers in exchange for a deal of a federal charge relating to the illegal firearm. Case was, however, eventually indicted on possession and trafficking in drugs and firearms, and for possession of the illegal "machine gun." Ongoing plea discussion ensued and Case moved to suppress evidence found in the home. The trial court denied the motion, finding that the warrant was properly supported and that "the personal items, although outside the scope of the warrant, were properly seized pursuant to the state forfeiture statute."

Case was convicted and appealed his sentence. He further appealed the issue of his motion to suppress.

ISSUE: May items be seized that are not on the warrant, but which are subject to forfeiture under state law?

HOLDING: Yes

DISCUSSION: Case argued that the officers disregarded the scope of the warrant when they seized the personal property. The Court noted, however, that the items were not actually seized pursuant to the warrant so they could not have been seized in "flagrant disregard" of it. Instead, they were seized pursuant to a separate state law.

With respect to the machine gun, the Court agreed that it was properly found to have been a violation of 18 USC §924(c)(1)(B)(ii), which criminalizes the possession of such weapons in furtherance of drug trafficking. The weapon was found fully loaded, wrapped in a blanket in the attic, which was accessed through a trap door with an attached ladder. The Court noted that made for convenient access and that the evidence suggested the space was frequently used. Despite his argument that he was entitled to a sentencing reduction based upon cooperation, the Court found no indication of continuing cooperation after his indictment.

The Court upheld his sentence.

SEARCH & SEIZURE – COMMON AREA

U.S. v. Mohammed, 2012 WL 4465626 (6th Cir. Ohio 2012)

FACTS: On July 21, 2009, the Cincinnati PD Vice team did a buy-bust on Mohammad. A CI told the officers that Mohammad (aka "Quan") had heroin for sale. He gave the officer detailed information about Mohammed's home, his vehicle and the details on a purchase. Recorded telephone calls used "coded dialogue" in discussing the buy, but none "captured any express mention of drugs." At about 6:25 p.m., Officer Fox accompanied the CI to the designated meeting place. Mohammad got out of his car and approached as if to open their car door – Officer Fox drove away and other officers moved in to arrest. Mohammed told the officers he had a firearm, and they recovered a loaded pistol from the center backseat console. Mohammed claimed to reside in an area different than the one given by the CI. A K9 alerted strongly on his car but no drugs were found.

The officers went to the address given by the CI and found another of Mohammed's vehicles parked, apparently in the street. A K9 alerted on that vehicle as well. The officers used the keys they'd seized from Mohammed to enter the locked foyer and again, the K9 alerted to Mohammed's apartment door. The officers sought a search warrant. Using that warrant, they found a large quantity of heroin and related items.

Mohammed was indicted for possession of the heroin. He moved for suppression, arguing that the warrantless entry into the foyer violated the Fourth Amendment. The trial court agreed that although the entry did, in fact, violate the Fourth Amendment, "there was sufficient probable cause to support the search warrant when the tainted portions of the search warrant were excised."[52]

Mohammed was convicted and appealed.

ISSUE: Is it proper to enter a locked foyer of an apartment building without a warrant?

HOLDING: No

DISCUSSION: The Court agreed that the officers "unconstitutionally entered the locked common area of Mohammed's apartment building without a warrant."[53] Looking to the independent source rule, however, the Court agreed that "evidence obtained pursuant to an unconstitutional search will be admitted if the Government shows that it was discovered through sources wholly independent of any constitutional violation."[54] Using this process, the Court agreed that removal of the information as to the apartment door where the dog alerted and that the keys obtained from Mohammed unlocked the

[52] U.S. v. Carriger, 541 F.2d 545 (6th Cir. 1976).
[53] U.S. v. Heath, 259 F.3d 522 (6th Cir. 2001).
[54] U.S. v. Jenkins, 396 F.3d 751 (6th Cir. 2005).

foyer and the apartment was proper. However, the Court noted that the remaining untainted information still supported the probable cause finding. (In fact, the evidence suggested that the officers already knew that Mohammed lived in Apartment 2, and as such, it was not necessary to excise that information.)

Mohammed also argued that the officers did not document the CI's reliability but the Court noted that the "veracity of the information is sufficiently established by the subsequent events corroborating the informant's information."

After resolving a number of other issues, the Court upheld Mohammed's conviction.

SEARCH & SEIZURE – PLAIN VIEW

U.S. v. Newsome, 2012 WL 5440027 (6th Cir. Ohio 2012)

FACTS: On September 29, 2010, someone fired multiple shots at Caver. Six weeks later, Newsome was identified as the shooter by Caver and another witness through photos. Newsome also owned a vehicle matching the description of the suspect vehicle. Armed with an arrest warrant, police went to his home. Newsome opened the door but then slammed it in the face of the officers. When the officers "started removing the door," Newsome changed his mind and opened it again. The door opened into the kitchen. He was promptly arrested and during the arrest, the officers spotted marijuana on the kitchen table. The officers did a protective sweep of the remainder of the house, "restraining a female in the living room area and noticing a large amount of crack cocaine and heroin on top of a dresser in the bedroom." Officer Bassett left to get a search warrant for the house, which was approved. The officers found a handgun in Newsome's jacket and a safe in the bedroom. When they were able to open the safe, they found another gun and crack cocaine.

Newsome was charged and moved to suppress. The trial court denied the motion with respect to drugs found in plain view and the gun found in his jacket, but suppressed it with respect to what was found in the safe. Newsome took a conditional guilty plea and appealed.

ISSUE: Might items in an adjacent room still be considered in plain view?

HOLDING: Yes

DISCUSSION: First, the court looked to the validity of the arrest warrant. The court agreed that normally, a witness making a choice from a photo array "does the trick." The Court noted that such eyewitness identifications are sufficient for probable cause, unless "there is an apparent reason for the officer to believe that the eyewitness was lying, did not accurately describe what he had seen, or was in some fashion mistaken regarding his recollection of the confrontation."[55] Although the Court agreed

[55] Ahlers v. Schebil, 188 F.3d 365 (6th Cir. 1999).

there was no indication of this, Newsome disagreed, however, noting that it does not say that the unidentified witness actually saw Newsome fire the shot. The court found that to be hypertechnical and that the warrant was sufficient and properly executed under Ohio law. Either way, the Court agreed it was executed in good faith by the officers.[56]

Looking to the seized evidence, the Court noted that the officers did not need a warrant to discover the drugs found in the kitchen or the bedroom.[57] The two rooms were apparently adjacent and flowed into the other. In the bedroom, they did only a cursory inspection and the drugs were in plain view. They did not seize the drugs immediately, preferring to wait for the warrant in an "abundance of caution." However, "the same cannot be said for the gun found in Newsome's jacket." Although the search warrant mentioned a gun there was no request in the warrant to search for it, only the drugs. The Court noted that although Newsome did not receive additional prison time, the firearm conviction did become part of his record. The Court vacated the conviction for the firearm in his jacket and remanded the case for limited resentencing.

SEARCH & SEIZURE - CONSENT

U.S. v. Bowser, 2012 WL 5861761 (6th Cir. Mich. 2012)

FACTS: During summer, 2010, the UPSET drug task force (Michigan) and the DEA investigated a large outdoor marijuana grow. Agent Poikey (DEA) and Trooper Croley (MSP) went to Bowser's residence to do a knock and talk, hopeful that he would cooperate. Treado answered the door and they asked to speak to Bowser. Bowser led them to his home office, but realizing that there was marijuana in plain view, he suggested they talk in another room. "His suggestion came too late" as the officers had already seen and smelled marijuana. The marijuana was seized and secured, but the officers assured him they weren't "greatly concerned" about it. He was not arrested at the time and assured them he wanted to cooperate. Over the next hour and a half, he was interviewed and provided a great deal of information. About halfway through, Trooper Croley noticed a cooler tucked under the desk. When asked, Bowser admitted it contained "more weed.' Bowser pulled it out and pushed it toward Agent Poikey, who opened it and removed three large bags of marijuana. The interview ended because Bowser was expecting company and did not want them to see the officers.

Bowser was indicted for distribution of marijuana under federal law. He moved for suppression of the marijuana found in the cooler, which was denied. He took a conditional guilty plea and appealed.

ISSUE: May consent be nonverbal?

HOLDING: Yes

[56] There was apparently an issue with the form of the warrant, which was initialed rather than signed, but this seemed to be consistent with how it had been done for some time.
[57] Maryland v. Buie, 494 U.S. 325 (1990).

DISCUSSION: The Court addressed the question as to whether Bowser gave implied consent for a search of the cooler. The Court agreed that "consent to search may be given not just by words but also by gesture or conduct."[58] The Court stated that it was reasonable to assume consent when Bowser pushed the cooler, having already identified the contents, towards Poikey.

The Court upheld Bowser's plea.

U.S. v. Oldham, 2012 WL 5935567 (6th Cir. Tenn. 2012)

FACTS: At 0530, on February 23, 2011, Officers Straub and Boguskie (Metro Nashville PD) were investigating a vehicle accident. An elderly man got their attention and told them a man at a nearby intersection was "flagging down cars and asking for money." He said he "didn't look right" and was afraid of the man. Officer Straub responded and found Oldham "approaching cars stopped at a four-way stop sign and knocking on their windows." He had Oldham come over to talk to him and they crossed the street. Both officers (Officer Boguskie having arrived) saw Oldham reach in his pants pocket multiple times and warned him to stop. They obtained consent for a frisk and found a sawed-off shotgun concealed in his pants.[59] Oldham was arrested and later discovered to also be a convicted felon.

Oldham was charged under federal law and moved for suppression. He argued that the officer "grabbed [his] arm, forced it behind his back, and marched him across the street to the officer's patrol car." He claimed that he did not put his hands in his pockets, but was "merely trying to hold up his baggy pants," and that he did not consent to a frisk. The Court denied his motion. Oldham took a conditional guilty plea and appealed.

ISSUE: Do minor discrepancies invalidate testimony as to consent?

HOLDING: No

DISCUSSION: Oldham noted "several minor inconsistencies in Officer Straub's testimony," but the Court agreed that "they concerned insignificant issues" and were properly disregarded by the trial court. The Court agreed that Oldham did, in fact, consent to accompany the officer and to the frisk, as well.

Oldham's plea was upheld.

[58] U.S. v. Carter, 378 F.3d 584 (6th Cir. 2004); U.S. v. Lucas, 640 F.3d 168 (6th Cir. 2011).
[59] The opinion said in his waistband.

SEARCH & SEIZURE - CURTILAGE

U.S. v. Anderson-Bagshaw, 2012 WL 6600331 (6th Cir. Ohio 2012)

FACTS: Bagshaw (now Bagshaw-Anderson) was a mail carrier in Ohio. She underwent surgery for back pain, which was unsuccessful. She was permitted to work on a limited duty schedule. In 2002, she was awarded total disability. Over the next few years, during several medical exams, it was concluded she could not go back to work due to pain and use of medications. She reported on the required annual documents that she "invested in alpacas" with her husband, but stated she didn't actually earn any income. In 2008, suspecting that she was actually involved in business activities, an investigator attended an event at the farm and witnessed Bagshaw mucking an area. Later that year, in an interview, Bagshaw denied performing any physical activities related to the farm. Following that interview, investigators began surveilling her, documenting her moving luggage, walking, sunbathing and playing bingo. They observed her on a cruise. Surveillance of her on the farm was difficult due to the position of the property, but they were able to use a camera from an adjacent property. During the days they were in operation, they captured her mowing the yard, raking, caring for the flock and pushing a wheelbarrow. (They also caught a few other more private occurrences.) The investigators got a search warrant and confiscated documents and home video.

Bagshaw was charged with fraud and related misrepresentations. She moved to suppress the footage from the camera. The Court denied the motion. She was convicted of most of the charges, and appealed.

ISSUE: May a camera located outside the curtilage be used to film a backyard?

HOLDING: Yes (but see discussion)

DISCUSSION: Bagshaw argued that the camera captured what was going on in her backyard, within the curtilage. The Court noted that she took no steps to conceal her backyard from the neighbor's property where the camera was located. The Court also noted that even if, subjectively, she felt she had that expectation of privacy, that it was not reasonable since the view for the camera was "identical to those available to a curious utility worker with a cheap pair of binoculars, or the disinterested glance of neighbors in either adjoining lot." The government never trespassed onto Bagshaw's property.

The Court looked at the area behind the house, dividing it into the backyard, the barnyard and the pasture. The Court noted that curtilage was decided based upon the unique facts of each property.[60] Specifically, the Court held the most relevant consideration is whether the area in question is "so intimately tied to the home itself that

[60] U.S. v. Dunn, 480 U.S. 294 (1987).

it should be placed under" Fourth Amendment protection. The Court agreed that both the barnyard and the pasture were clearly in the open fields, where Bagshaw had no reasonable expectation of privacy. However, the backyard clearly was within the curtilage and was enclosed in part by a line of trees. The Court noted that an area can be curtilage even if neighbors have a view of it.[61] The area included a picnic table and a clothesline and was partially obscured by the house and foliage.

However, concluding it was curtilage is not enough, since officers "are entitled to observe things in plain sight from publicly accessible areas."[62] In this case, the area was visible from the vacant lot where the camera was mounted and the view was about the same from the top of the pole, where it was mounted for technical reasons, as it would have been from eye level.

The Court did express some concern "about a rule that would allow the government to conduct long-term video surveillance of a person's backyard without a warrant. Few people, it seems, would expect that the government can constantly film their backyard for over three weeks using a secret camera that can pan and zoom and stream a live image to government agents." However, the Court decided any error was harmless and declined to decide, at this point, "whether long-term video surveillance of curtilage requires a warrant." Only a few clips of Bagshaw were shown the jury when she was in the backyard. By far the best evidence against her was the cruise surveillance footage, and the home movies recovered pursuant to the search warrant clearly showed her physical activities with the alpacas.

The Court affirmed Bagshaw's convictions.

SEARCH & SEIZURE - TERRY

U.S. v. Johnson, 2012 WL 6720244 (6th Cir. Mich. 2012)

FACTS: On August 20, 2010, at about 0145, a 911 operator received a call about a "man with a gun" walking down a street in Detroit. The man was described as wearing a blue t-shirt and dark-colored shorts. Officers responded to the scene but officers who testified later testified differently as to "what information was relayed in the call." In any event, the officers found Johnson walking in the area, and noted his "unusual gait" – as if he was trying to keep his pants up by keeping his legs wider apart than normal. They also noted that his shirt was "protruding a nice amount" and that the bulge moved. The officers believed he had a weapon in that location. Eventually, Officer Hill stopped his car, with the light activated, and "jumped out with his weapon drawn and pointed down," ordering Johnson to stop. Johnson complied with the orders and he was frisked. Officer Hill found a rifle with the stock cut off and Johnson was arrested. The entire stop lasted less than three minutes.

[61], 461 F.3d 646 (6th Cir. 2006).
[62] California v. Ciraolo, 476 U.S. 207 (1986).

Johnson, a felon, was charged with possession of the weapon. He moved for suppression, arguing that the seizure was as a result of an unconstitutional stop, as the officers lacked a reasonable suspicion to stop him and that they exceeded the scope of any permitted search. At the hearing, Officers Hill and Davis were questioned about discrepancies in their reports and testimony. The Court denied the motion to suppress, finding the inconsistencies to be "more semantic" than anything. Johnson also sought to exclude the 911 call, that was also denied. Johnson was convicted and appealed.

ISSUE: Does displaying a weapon take a stop outside the bounds of Terry?

HOLDING: No

DISCUSSION: First, with respect to the stop, the Court agreed that based upon the stated facts, the officers had reasonable suspicion to make the stop. The Court agreed that although there were discrepancies, the trial court had an opportunity to judge the officers' demeanor and manner of responding. Although finding that their "testimonies were less than ideal," the Court agreed that the discrepancies could be attributed to sloppiness. With respect to the scope, the Court noted that the Terry stop "ripened almost immediately into a de facto arrest" by the officers' actions. Looking to Florida v. Royer, the Court noted that officers are not to use "means that approach the conditions of arrest." However, simply displaying a weapon does not exceed a Terry stop boundaries "when reasonably necessary for the protection of the officers or to effectuate the investigatory stop."[63] Even at the time of the initial interaction, the officers believed Johnson was armed and as such, drawing a weapon was proper. The Court agreed that admitting the weapon found was proper.

With respect to the 911 call, the Court agreed that the hearsay on the call was not testimonial, and as such, did not violate the Sixth Amendment Confrontation Clause. Further, it was admissible as a present sense impression. The Court agreed that nontestimonial statements do not invoke the Confrontation Clause.[64] In this case, an anonymous caller called 911 for assistance, to "enable police assistance in response to any ongoing emergency." As such, it was admissible.

The Court affirmed Johnson's conviction.

U.S. v. Russ, 2012 WL 6115922 (6th Cir. Ohio 2012)

FACTS: On July 10, 2010, Russ fled from a U.S. Marshal and police in an unnamed Ohio jurisdiction, following a brief stop. Following his arrest, officers retraced the path he'd taken and a K9 located a revolver. Russ, a convicted felon, was charged with possession of the gun as the Marshal apparently saw the weapon on Russ as he fled. He moved for suppression. When that was denied, Russ was convicted. He then appealed.

[63] Houston v. Clark Cnty. Sheriff Deputy John Does 1-5, 174 F.3d 809 (6th Cir. 1999).
[64] Whorton v. Bockting, 549 U.S. 406 (2007).

ISSUE: Does a flight from officers justify a Terry stop?

HOLDING: Yes

DISCUSSION: The Court noted that when Russ ran for the officers after a brief interaction, it was reasonable suspicion to pursue him to investigate. As such, the finding of the weapon was also lawful. The Court upheld the denial of the suppression motion, but due to a jury error, the conviction was reversed.

U.S. v. Young, 2012 WL 6621352 (6th Cir. Mich. 2012)

FACTS: On December 15, 2006, at about 1:15 a.m, Young was reclining in the passenger seat of a car parked in a lot outside a Grand Rapids bar. The lot was used by patrons of the bar but had also been the site of violent crime. Officers regularly patrolled for loitering individuals, having learned that people with guns stay outside the bar, which did security checks. (It was unlawful for someone to be in the lot without having business at one of the nearby locations.) Officers Fannon and Johnson pulled into the lot and they spotted the car. Officer Loeb arrived and the officers approached, looking through the windows with flashlights. Young rolled down the window and Fannon asked for ID. Young explained his friend had gone inside to see about getting a table or take-out. The friend (Eric) was emerging at that time. The officers told Eric to go back inside and Young to "sit tight." Officer Johnson proceeded to check Young's information and they explained about the law regarding the lot. Officer Fannon observed Young touching his pocket in a way that was suspicious. Young denied having a weapon, but continued his "gestures." He stepped out when ordered to do so. Young then admitted to having a gun in the pocket. He was searched and handcuffed. Officer Johnson reported he had an outstanding arrest warrant.

Young, a felon, was charged with possession of the weapon. Young moved for suppression of the gun, arguing they had no right to approach him in the lot. The Court disagreed and refused to suppress the gun. Young took a conditional guilty plea and appealed.

ISSUE: Does blocking in a car constitute a seizure?

HOLDING: Yes

DISCUSSION: The Court looked to similar situations and noted that when police park in such a way that a parked vehicle cannot leave, they are seized under Terry. The Court agreed that in this case, the officers did park in such a way that the vehicle could not leave and that the officers' further actions only solidified it. However, the Court noted the suspicion of trespassing made the interaction proper even though other factors, the crime history of the lot and practice of the bar to do pat-downs were not specific to Young. The Court noted that such "contextual factors … should not be given too much weight because they raise concerns of racial, ethnic, and socioeconomic

profiling."[65] However, that does not mean that they are not relevant in a totality analysis. Officers testified that "the trespassing and gun crimes are inter-related." Young's position in the vehicle was unusual, as was the fact that "he appeared to be going nowhere." They had not yet gotten his explanation for his presence in the parking lot. As such, he appeared to be trespassing. They quickly discounted his argument that a trespassing violation was not enough to justify a Terry stop, because it didn't pose a threat. Further, a warrant check and questioning was appropriate to the situation. Questioning a person's identity was a standard part of many Terry stops and "knowledge of identity may inform an officer that a suspect is wanted for another offense." Because that check, which resulted in the discovery of a warrant, was valid, the fruit of that information, the gun, was validly seized.

The Court upheld Young's plea.

U.S. v. Cochrane, 702 F.3d 334 (6th Cir. Ohio 2012)

FACTS: On February 4, 2011, members of the Youngstown (OH) task force (focusing on gun and drug crime) stopped Cochrane for a traffic offense. Although a drug dog alerted on the vehicle, no drugs were found. Cochrane was giving a warning and sent on his way. On March 15, the same officers again spotted him. Since Cochrane's vehicle lacked a required front plate, they followed him to an apartment building where his fiancée and children were known to live. He was already out of the vehicle when the officers pulled up and they ordered him back to the car. Lt. Mercer spoke to him briefly. There was dispute about whether Cochrane gave consent for a search of the vehicle, but ultimately, a firearm was located hidden in the console. Cochrane was arrested for improper handling of the weapon and at some point, also received a citation for the traffic offense.

Cochrane was also later indicted on being a felon in possession. He moved for suppression, arguing the stop was improper and the search done without consent. His motion was denied and he was convicted. Cochrane then appealed.

ISSUE: Does asking questions about contraband before asking for a license make a vehicle stop improper?

HOLDING: No

DISCUSSION: Cochrane did not dispute that the initial stop was justified due to the license plate violation. However, he argued that it went on too long. The court agreed that the conversation with Lt. Mercer was "extremely brief" – just a few sentences. The short duration, pursuant to U.S. v. Everett,[66] coupled with questioning "directed toward officer safety … do not bespeak a lack of diligence" in pursuing the original reason for the stop. Although Mercer asked about drugs, as well, that "minuscule additional delay" did not offset the pursuit of safety information. The Court noted that there was

[65] U.S. v. Caruthers, 458 F.3d 459 (6th Cir. 2006).
[66] 601 F.3d 484 (6th Cir. 2010).

no rule that the officer must ask for OL and registration before asking about contraband. The Court agreed the questioning did not make the seizure unreasonable.

With respect to the consent to search, Mercer argued both that he did not give consent or that, if he did, it was not voluntary. The Court gave more credence to Lt. Mercer's testimony that Cochrane said "go ahead" to his request. In addition, the Court agreed that he was not coerced, as the officers did not physically threaten or intimidate him.

Cochrane's conviction was upheld.

U.S. v. Haywood, 2012 WL 5896552 (6th Cir. Ohio 2012)

FACTS: In March, 2009, Memphis PD received a tip from a CI that Haywood was selling cocaine and other drugs from his grandfather's home. The CI, who had been reliable in the past, described Haywood and gave a license number for his vehicle. Det. McNeal set up surveillance and sought a search warrant. Det. Tate started watching the house and the vehicle from a block away. He watched Haywood walk to the car and sit inside, with different people, 3 times in an hour. Det. Tate then watched Holloway drive up and Haywood pass Holloway a gun. Haywood got inside that vehicle on the passenger side. Concerned that Haywood was about to leave, Tate radioed the rest of the team.

Tate then got out of his vehicle and stopped Holloway. (He was in a police vest at the time.) Other detectives arrived and Haywood jumped out of the vehicle and ran. He was eventually arrested and searched, and the detectives found drugs and over $4,000 in cash on his person. When the search warrant arrived, they searched Haywood's vehicle, left at the house, and found more drugs and money.

Haywood denied everything and maintained he didn't know that Tate was an officer when he stopped the vehicle. He eventually took a conditional guilty plea and appealed.

ISSUE: Does prior possession of a weapon justify a Terry frisk?

HOLDING: Yes

DISCUSSION: The court agreed that Haywood had been in possession of a gun and had fled from the officers. Although Tate's ability to see inside the vehicle was questioned, as was his inability to give a precise details of what he'd observed prior to the arrest, the Court found him to be credible.

Further, the Court rejected any "cognitive-bias argument," as Haywood argued that Tate saw what he expected to see – "some kind of action." However, the Court agreed with Haywood that the Terry stop doctrine supported the suppression of the items in his pockets, as there was no testimony that supported the idea that the "detectives plainly recognized the presence of the drugs and cash upon placing their hands over

Haywood's pockets." Unfortunately, however, for Haywood, the Court ruled that even though the flight itself might not have been a crime, once he was apprehended by officers in a marked car, and "yet forcibly attempted to break free," he did commit a crime. As such, even if the actual "stop" was unlawful, his attempt to fight his way free was not. For that reason, the search of his pockets was done incident to a lawful arrest. Once they found the drugs and cash in his pockets, the officers were authorized under the "automobile exception" to search Haywood's vehicle, still parked in the driveway.

Haywood's plea was upheld.

SEARCH & SEIZURE – VEHICLE STOP

U.S. v. Barnett, 2012 WL 5439952 (6th Cir. 2012)

FACTS: As part of a larger investigation into drug trafficking, on May 13, 2008 Texas state police pulled over a RV, driven by Barnett, because it twice crossed the fog line and drove on the shoulder. During a consent search, they found 600 pounds of marijuana in 17 bundles. Barnett moved for suppression and was denied. He was convicted as part of the larger conspiracy and appealed.

ISSUE: Does a minor traffic offense justify a stop?

HOLDING: Yes

DISCUSSION: The court noted that under Texas law, driving on the shoulder was a traffic offense that provided probable cause for a stop. Barnett argued that the provisions of a Tennessee case should be followed, but the Court noted that the case did not apply because it was applying Tennessee law, which was different than Texas law.[67]

The court upheld Barnett's conviction.

U.S. v. Ivey, 2012 WL 6028881 (6th Cir. Ohio 2012)

FACTS: On the day in question, Officers McCoy and Horning (Amherst, OH) were having lunch in their respective cruisers when they spotted a van without a front license plate (as required in Ohio),. They followed, eventually making a traffic stop using lights and sirens. The stop was recorded, as well. Officer McCoy, speaking to the driver, noticed that Ivey, the front seat passenger, was not wearing a seat belt. Officer McCoy eventually walked around to the passenger side and noted that Ivey was nervous, looking straight ahead, sweating and his pulse (in the carotid artery) was pounding. He provided valid ID. McCoy returned to the cruiser to run all three occupants (including a back seat passenger), checking specifically with the Lorain PD because Ivey and the other passenger were from there. As they were waiting for the information, McCoy

[67] See U.S. v. Freeman, 209 F.3d 464 (6th Cir. 2000).

was told by Horning that Ivey was "moving around quite a bit, making movements, as if he is attempting to conceal something." He returned to ask Ivey to step out. McCoy asked Ivey for permission to frisk. Ivey asked if there was a warrant, which McCoy essentially denied (as he did not yet have information on that) and Ivey "dashed away toward the opposite side of the street." He ran directly into the side of a car and fell. As he got up, McCoy tackled him and a handgun fell from Ivey's pants. He was arrested and given Miranda warnings. When asked why he fled, he "stated simply, 'because I had a ******* gun.'"

Because Ivey was a convicted felon, he was prosecuted in federal court. He moved for suppression and was denied, with the Court concluded that the officers' actions were proper. Ivey took a conditional guilty plea and appealed.

ISSUE: Is it proper to have passengers get out of a vehicle?

HOLDING: Yes

DISCUSSION: Because Ivey admitted that much of what occurred was proper, all that was left to decide was it was proper to get Ivey out of the vehicle and ask him to consent to a frisk. The Court looked to Maryland v. Wilson[68] and agreed it was proper to order passengers from a vehicle and that it was further proper to "ask questions completely unrelated to the reason for the initial detention as long as the questions do not 'measurably extend the duration of the stop.'"[69] McCoy had not yet received the final information on his valid criminal-records search when he was alerted to Ivey's actions.

The Court upheld the denial of the suppression motion, and Ivey's plea.

U.S. v. Davis, 2012 WL 5200368 (6th Cir. Ohio 2012)

FACTS: Davis was a passenger in a vehicle driven by his mother. Officers stopped the vehicle for crossing the double yellow line twice, with oncoming traffic – it almost struck one of the vehicles. Davis was asked if he had "anything on him" – he responded he had a weapon in his back pocket.

Davis was charged with being a felon in possession of a firearm (and ammunition). He took a conditional guilty plea and appealed.

ISSUE: Does a minor traffic violation justify a stop?

HOLDING: Yes

[68] 519 U.S. 409 (1997).
[69] Arizona v. Johnson, 555 U.S. 323 (2009); U.S. v. Everett, 601 F.3d 484 (6th Cir. 2010).

DISCUSSION: The court noted that an "officer may lawfully stop a motorist who he has probable cause to believe has committed a traffic violation."[70] Although Davis argued that the officers stopped the car because they suspected narcotics trafficking, the Court agreed that the officer's motivations were immaterial.[71]

With respect to the officer's question, the Court agreed that the question "did not constitute a search and therefore, did not violate the Fourth Amendment." It is not the "verbal equivalent of reaching into an individual's pocket or ordering an individual to 'empty his pockets.'"[72]

The Court upheld the plea.

INTERROGATION

U.S. v. Peavy, 2012 WL 6734674 (6th Cir. Ohio 2012)

FACTS: On April 1, 2010, at about 7 a.m., Stow PD (OH) officers went to serve an arrest warrant for Peavy at his mother's home. All of the officers were aware of Peavy's criminal background. They found Peavy's usual vehicle at the house and they heard the voices of at least two people inside. Officers knocked loudly and eventually, Peavy came to the door. When he finally opened it, he was ordered to the ground by the FBI, handcuffed and removed. He said that one other person was inside and that there was a shotgun under the couch cushion. The officers did a protective sweep, finding Hutson, who told them he'd put a handgun in the kitchen trashcan. Peavy was given his Miranda rights and taken for interrogation on his involvement in an identity theft conspiracy. He was not asked about the firearm at that time.

Peavy were charged in relation to the identity theft conspiracy. Peavy was separately indicted for the weapon. Peavy took a plea on one of the charges (for wire fraud) but moved to suppress the statements made during his arrest and the firearm that was seized as a result. He was denied and ultimately convicted. He then appealed.

ISSUE: Is a hectic atmosphere necessarily coercive?

HOLDING: No

DISCUSSION: Peavy argued that his statements were involuntary and unwarned. The Court found no evidence, however, that the officers were "objectively coercive" or that Peavy's will was overborne. He had been detained only briefly when he was questioned. The Court agreed that "arrests often involve numerous police officers and a certain amount of chaos and confusion, but a hectic atmosphere is not necessarily a coercive one."[73] Nor does his being handcuffed do so, either. The Court agreed that

[70] U.S. v. Freeman, 209 F.3d 464 (6th Cir. 2000).
[71] U.S. v. Burton, 334 F.3d 514 (6th Cir. 2003);, Whren v. U.S,, 517 U.S. 806 (1996).
[72] U.S. v. Street, 614 F.3d 228 (6th Cir. 2010).
[73] U.S. v. Church, 970 F.2d 401, 404 (7th Cir. 1992)

Peavy was not given Miranda before telling them about the shotgun, but agreed that the "public safety exception" applied under the circumstances.[74] The Court noted that the "public safety exception applies "when officers have a reasonable belief based on articulable facts that they are in danger."[75]

The Court applied a two-pronged inquiry:

> [A]t a minimum, [the officer] must have reason to believe (1) that the defendant might have (or recently have had) a weapon, and (2) that someone other than police might gain access to the weapon and inflict harm with it. The public safety exception is applied if and only if both of those two conditions are satisfied and no other context-specific evidence rebuts the inference that the officer reasonably could have perceived a threat to public safety.

Peavy argued they had no reason to believe he was armed, or that someone else might have access to any weapon in the house. The Court noted Peavy had an extensive criminal history that included drugs and violence and that although he had only one specific weapons charge, he had multiple charges relating to drugs and violence. The Court agreed that the officers "had several reasons to suspect that someone other than Peavy and Hutson, both of whom were detained immediately upon entry, was in the house." There were three cars in the driveway, they heard multiple voices and there was a delay in Peavy answering the door. There was a reasonable belief a third party might access the shotgun.

Further, under U.S. v. Patane, physical evidence gained as a result of an improper statement was still admissible at trial.[76] The Court upheld Peavy's conviction.

42 U.S.C. §1983 – USE OF FORCE

Barkovic v. Hogan & Township of Shelby (MI), 2012 WL 5862468 (6th Cir. Mich. 2012)

FACTS: Prior to March 10, 2009, Barkovic (a defense attorney) and Officer Hogan (Shelby Township PD) had a contentious history. On that day, Officer Hogan was in court, in response to a subpoena and arrived at the conference room. Hogan later said that Barkovic 'was disrespecting everybody in that whole room that day" – calling people names. After they left, the pair got into a verbal argument that escalated into a physical fight that started with mutual pushing, although the stories differed. At some point, Barkovic ended upon on the floor.

Barkovic sued Hogan and his agency, claiming use of force and related claims, under 42 U.S.C. §1983. Hogan counterclaimed for assault and battery. Ultimately all other parties were dismissed, leaving only assault claims between the two. Hogan claimed he

[74] New York v. Quarles, 467 U.S. 649 (1984); U.S. v. Williams, 483 F.3d 425 (6th Cir. 2007)
[75] U.S. v. Talley, 275 F.3d 560 (6th Cir. 2001).
[76] 542 U.S. 630, 637 (2004).

was not acting under the color of state law, but did raise the defense of qualified and statutory immunity, stating he acted in the course of his employment. The Court found he was not acting under color of law and dismissed the assault claims against Hogan. Barkovic appealed.

ISSUE: Must an officer be acting under color of law to raise a qualified immunity defense?

HOLDING: Yes

DISCUSSION: The Court discussed the limited case law available on when an officer is acting under color of law. In Chapman v. Higbee Co.,[77] a deputy took action while working under secondary employment but in uniform, with badge and weapon. The Court noted that since he took actions that only law enforcement could take, while working for the secondary employer, the deputy went beyond a security guard. The Court agreed that there were "unanswered questions of fact" that were necessary to make the decision as to whether Hogan was acting in his official capacity. Hogan noted he was not in uniform nor did he display a badge or weapon, however, his own arguments raised defenses available only to law enforcement.

Citing the need for more facts, the Court reversed the summary judgment and remanded the case.

Gentry v. County of Wayne, 2012 WL 4477530 (6th Cir. Mich 2012)

FACTS: The "crux" of the argument in this case involved a "struggle in the stairwell immediately" before Deputy Carmona (Wayne County, MI, SO) shot Gentry. According to Deputy Carmona, Gentry fell on top of Deputy Morrow, who shouted that Gentry "was trying to take his weapon." Deputy Carmona believed Gentry was in fact trying to do so and fired at Gentry's back. (Gentry argued, however, that they both fell beside each other, and that Deputy Morrow did not shout.)

Gentry filed suit under 42 U.S.C. §1983. The deputies requested qualified immunity and summary judgment, which was denied. The deputies appealed.

ISSUE: Is reasonableness the standard for a use of force case?

HOLDING: Yes

DISCUSSION: The Court noted that excessive/deadly force claims must be analyzed under the Fourth Amendment's reasonableness standard.[78] Whether a use of force is reasonable "depends primary on objective assessment of the danger a suspect poses at the moment."[79] The Court agreed that the trial court's focus on the "moments

[77] 319 F.3d 825 (6th Cir. 2003).
[78] Schrieber v. Moe, 596 F.3d 323 (6th Cir. 2011).
[79] Bouggess v. Mattingly, 482 F.3d 886 (6th Cir. 2007).

immediately preceding the" shooting was appropriate." And, since those moments were disputed by the parties, it was necessary to allow the case to go forward, even though Gentry's testimony conflicted with that of the officers.

The Court dismissed the appeal.

Estate of Allen v. City of West Memphis, 2012 WL 6634306 (6th Cir. 2012)

FACTS: On July 18, 2004, about midnight, Officer Forthman (West Memphis, Arkansas) stopped a vehicle with only one headlight. Rickard was driving, Allen was the passenger. When the officer attempted to question Rickard about vehicle damage, Rickard sped off. Officers pursued Rickard into Memphis, Tennessee. Officers indicated that Richard tried to "ram" them via their radios. Eventually, one of the officers collided with Rickard, with Rickard apparently intentionally hitting the vehicle head-on. Rickard still attempted to get away but was unsuccessful. Officer Plumhoff fired three shots into the vehicle from near the passenger side. Rickard took off and Officer Gardner fired ten shots into the vehicle, from the side and then the rear. Officer Galtelli fired two shots. Rickard lost control and crashed into a building. Both Rickard and Allen died.

The estates of both Rickard and Allen sued West Memphis under 42 U.S.C. §1983. The defendant officers moved for summary judgment under qualified immunity, and the trial court denied it with respect to the Rickard claim. (The Court also ruled that because the shooting occurred in Tennessee, the officers were not entitled to state law immunity under Arkansas law.) The defendant officers appealed.

ISSUE: Is it justified to shoot into a stopped vehicle, absent other evidence?

HOLDING: No

DISCUSSION: The court noted the similarity in the facts of this case with the facts in Scott v. Harris.[80] However, the Court stated that "as always, the devil is in the details, and it is those details that cause [the Court] to conclude that Scott is distinguishable." The Court noted that the vehicle in Scott was rammed while it was still actively fleeing, but that Richard's vehicle "was essentially stopped and surrounded by police officers and police cars although some effort to elude capture was still being made." The officers knew that there was a passenger in the vehicle when they fired 15 shots at close range. The Court noted that the defendants "make much of the fact that they felt they were in personal danger" but stated that "the degree to which that was true is not resolved by the video recordings." The Court agreed this case was more complex than Scott and that the video didn't provide clear support for either side. The Court made a point that after the Scott decision, it "would appear that an interlocutory appeal of a denial of qualified immunity which makes a good faith Scott claim requires [the court] to review the record" itself.

[80] 550 U.S. 372 (2007).

The Court upheld the dismissal of the qualified immunity motion, allowing the case to go forward. It addressed, in passing, the issues of applying an Arkansas statute to Arkansas officers taking action in Tennessee (and conversely, applying Tennessee law to their actions) and agreed that neither applied to an alleged civil rights violation.

Sutton v. Metro Nashville and Martin, 700 F.3d 865 (6th Cir. Tenn. 2012)

FACTS: On April 21, 2009, Officer Martin (Metro Nashville PD) responded to a grocery store shoplifting. "He ended up in possession of a cell phone that was found in the pocket of a jacket dropped by the alleged perpetrator." He called a number in the contacts list and the person who answered identified the holder of the phone as Sutton, who worked at "Summit Hospital." Officer Martin went to the hospital in search of Sutton. Sutton, who was working in the kitchen, was told that "someone was in the cafeteria wanting to see him." There he was surrounded by Officer Martin and other officers. He was asked about the phone and denied it was his. He produced his own cell phone upon request and Officer Martin "promptly confiscated" it over Sutton's objections. (He supposedly suggested that Sutton might have two cell phones in order to have a "couple nurses on the side.") Officer Martin refused to give Sutton the phone to call his wife, or to allow him to "clock out" from his job. The officer told Sutton if he admitted to shoplifting, he would just get a citation, but Sutton denied the theft.

Officer Martin "took Sutton tightly by the arm" and escorted him from the hospital. A Kroger security guard, waiting outside, identified Sutton as the shoplifter. Sutton was arrested and taken back to the grocery store, where he waited in a cruiser while they reviewed the video. Officer Martin expressed uncertainty about whether Sutton was the person in the video, but was urged by the security guard to make the arrest. (The guard later swore out a warrant on Sutton, as well.) Sutton was held until his wife posted bond.

Sutton was acquitted at trial, in June 2009. He filed suit against Officer Martin, the guard, Metro Nashville and Kroger. The Court dismissed most of the charges, upon Officer Martin's motion, but refused to dismiss Sutton's claim of an unreasonable search and seizure. The trial court ruled that the officer lacked even reasonable suspicion to detain Sutton, because the person in the contacts list was not necessarily reliable. (The facts are unclear as to how the person he called identified the owner of the phone.)

Officer Martin appealed the denial.

ISSUE: Is it proper to, in effect, arrest someone without probable cause?

HOLDING: No

DISCUSSION: With respect to the initial encounter, at the hospital, Officer Martin claimed it was an investigatory detention. The Court noted that at that point, the "permissible scope of Officer Martin's initial detention of Sutton was to ascertain his identity and to ask limited questions regarding the cell phone found at the Kroger." That

did not allow Officer Martin, however, to seize Sutton and forcibly remove him from his workplace – such actions changed the interaction from a Terry investigation to a "Royer-like arrest."[81] Even though he was identified once he got outside by the security guard, it was improper to, in effect, arrest him to get him outside the hospital.
The Court agreed the seizure was improper and upheld the denial of summary judgment for Officer Martin.

Jones v. City of Cincinnati, 2012 WL 5974432 (6th Cir. Ohio 2012)

FACTS: On November 30, 2003, shortly before 6 a.m., Cincinnati firefighters sought help with a disorderly person in a parking lot. Officers Pike and Osterman arrived, finding Jones "marching, squatting, and shouting profanities outside." Jones weighed 348 pounds and was 5'11. Pike called in, stating that he "may be violent" and required a mental health response team. He turned on his video system, but some of the view of the camera was obscured by the vehicle. However, it did record Jones punching at Officer Pike, as well as Osterman and Pike tackling Jones. Jones did not comply with orders and struggled as both officers struck him with their batons. At one point, Jones grabbed toward Osterman's waist and also seized Pike's baton briefly. More officers arrived and the officers used batons as they tried to handcuff Jones. Within two minutes of the beginning of the encounter, Jones can be heard moaning and he is lying still. As the officers get him handcuffed and roll him over, they are heard on the video calling for the firefighters to come over, but they had already left and had to be summoned back to the scene. The officers can be seen on the video checking his pulse but they noted that he didn't appear to be breathing. Within two minutes, the fire department arrived and began CPR. Jones was pronounced dead within the hour, and his death attributed to "abnormal cardiac rhythms resulting from a violent struggle and positional asphyxia."

Jones's estate filed suit under 42 U.S.C. §1983. The officers requested qualified immunity and were denied. They appealed.

ISSUE: Is the reasonableness of a use of force determined by the precise facts of each case?

HOLDING: Yes

DISCUSSION: The Court examined each of the claims in turn. With respect to the baton use, the court agreed that Jones, a large man, initiated a struggle with the two officers and did not comply with their orders. The Court found it significant that the officers "directed all jabs and strikes to non-critical areas of Jones' body, such as arms, torso, back, and legs." The Court noted that "even assuming that Jones started struggling to breathe" while he was being struck, that did not mean the officers' actions were objectively unreasonable. "Given the "rapidly evolving circumstances," it would not have been possible for them to know whether he was resisting because he chose not to comply or because he was unable to breathe." Either way, the officers would be

[81] Florida v. Royer, 460 U.S. 491 (1983).

entitled to qualified immunity for an "objectively reasonable mistake as to the amount of force that was necessary."

The Estate also questioned the refusal of one of the officers to remove Jones's handcuffs when requested to do so by the firefighter. The Court agreed that although subjective motivations are not relevant in such cases, the officer's explanation that he did not know if Jones was feigning injury and that putting on the handcuffs was very difficult was persuasive in showing the officer's objective reasons for the refusal. The Court noted that no one told the officer that they couldn't do CPR with the handcuffs in place. The Court agreed that the refusal to remove the cuffs was not objectively unreasonable.

The Estate also argued that the officers were deliberately indifferent to Jones's medical needs. The Court noted that within a minute of securing him, they realized he needed to be rolled over onto his back and they did so immediately. They called immediately for medical assistance when they realized the fire department had left and they took action, within their ability to address his medical emergency. The Court agreed that their actions were reasonable.

Finally, the Court found no fault in any of their actions under Ohio law, either. The Court reversed the denial of qualified immunity and remanded the case for an order to that effect.

Estate of Hickman v. Moore (and others), 2012 WL 4857037 (6th Cir. Tenn. 2012)

FACTS: On February 24, 2008, Officers Craig, Moore, Berkley and Gilmore (Blount County, TN) attempted to lure Hickman from his home in order to arrest him. Craig, in plainclothes, was to convince Hickman to come outside to assist her with a vehicle. During the effort, however, she lost cell phone contact with her fellow deputies. When Hickman began to look under the hood, Deputies, Moore, Gilman and Berkley ran toward him, identifying their agency (Sheriff's Office) and telling him to show his hands. "Instead, Hickman placed his right hand inside his coat pocket and 'brought it up in his jacket' as if he was pointing a gun at Moore." Moore began yelling "gun" as other officers were still yelling for Hickman to show his hands. Berkley racked his shotgun, causing Hickman to turn toward him. Craig drew her weapon and fired at Hickman's back. He was handcuffed after he fell and the deputies asserted they found a weapon at that time. Hickman, who died prior to trial, stated that Craig panicked and "emptied her entire magazine" and that Moore also fired "gratuitously and in reaction" to Craig shooting. Hickman also alleged that before calling for an ambulance, they moved him, entered his residence, and removed weapons. He contended that one of the deputies told Officer Hernandez (Alcoa PD) that Hickman would not take his hands from his pockets and that he was "known to have assault weapons." During a subsequent consent search, deputies found a gun and empty holster, which his wife claimed was not one Hickman would have carried.

Hickman's estate filed suit, making excessive force and related claims under both federal and state law. The District Court gave summary judgment to most of the

deputies and Blount County. The Court found enough evidence to question Moore's use of force, however, and denied summary judgment to him.. Hickman appealed the dismissals, and Moore appealed the denial of summary judgment in his favor.

ISSUE: Is summary judgment permitted on a use of force when there are disputed facts?

HOLDING: No

DISCUSSION: The Court began by noting that the first prong in the Saucier test requires identifying the "specific constitutional right allegedly infringed." Hickman alleged excessive force, which must be evaluated under the Fourth Amendment's "objective reasonableness" standard.[82] In a use of force situation, reasonableness is assessed as "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[83] In addition, an "officer who has not exerted excessive force "may be responsible for another officer's use of excessive force if the officer (1) actively participated in the use of excessive force, (2) supervised the officer who used excessive force, or (3) owed the victim a duty of protection against the use of excessive force."[84]

First, with respect to Deputy Craig, the Court found no reason to find she'd "fired in panic," and also, that she "reasonably believed that Hickman had a gun at the time she fired, despite her failure to see a gun, based on her knowledge of his prior threats, her interactions with him up to that point, and hearing Moore yell 'gun, gun, gun.'" The Court agreed that her decision to shoot was reasonable. The Court agreed that Craig did not know where her fellow officers were precisely located, and noted that she also knew that "(1) Hickman's wife and adult daughter had warned the officers that Hickman had threatened to use deadly force against them, (2) Hickman was not complying with the officers' orders to show his hands, and (3) Moore had recently indicated that Hickman had a gun."

With respect to Berkley and Gilmore, neither fired. Hickman argued that under Claybrook v. Birchwell, however, that both deputies "may be held liable for participating in the events leading up to a police shooting if the police "ultimately brought the parties from stand-off to shoot-out."[85] The Court easily distinguished Claybrook from the case at bar, however, noting that both identified themselves and did nothing to provoke Hickman's response. The Court found no dispute that Hickman engaged in "threatening conduct" prior to the shooting. The Court affirmed the summary judgment on their behalf.

[82] Simmonds v. Genesse Cnty., 682 F.3d 438 (6th Cir. 2012); Graham v. Connor, 490 U.S. 386 (1989).
[83] Graham, supra.
[84] Bletz v.Gribble, 641 F.3d 743 (6th Cir. 2011).
[85] 274 F.3d 1098 (6th Cir. 2001).

With respect to Moore, the Court noted that he apparently shot Hickman after he had "turned away and was heading in the direction of his house." Because of the dispute, the Court refused to consider Moore's appeal.

With respect to claims against Sheriff Berrong and Blount County, the Court reviewed the Sheriff's deadly force policy. The Court found it to satisfactorily meet the Garner [86] standard and as such, was constitutional. The Court noted that a "handful of isolated excessive force complaints from the past did not create a 'pattern or practice' of condoning such activity, particularly since the county investigated and addressed each complaint."

In conclusion, the Court noted that the only question, with respect to Craig, was whether her "prior knowledge and perception of events would give a reasonable officer probable cause to discharge her weapon." The court upheld all of the decisions of the District Court.

42 U.S.C. §1983 – ARREST

Frodge / Pence v. City of Newport, 2012 WL 4773558 (6th Cir. Ohio 2012)

FACTS: On May 31, 2009, Frodge and Pence spent the evening in Newport with friends, celebrating Pence's birthday. Pence was driving on the way home. Hearing sirens, she pulled over to allow an ambulance to pass. She was pulling out into traffic when a white vehicle sped past. She honked her horn and continued to drive. Eventually, the white vehicle slowed down and Pence moved over to pass it. The vehicles were even long enough for the rear passenger (Burbrink) to scream, curse and "flip off" Frodge and Pence. They responded in kind. When they got to a stop light at an entertainment venue (Newport on the Levee), Burbrink got out and approached Pence's vehicle on the passenger side. Burbrink was cursing out Frodge, who told Burbrink that he was a police officer.[87] Frodge told Burbrink he was supposed to yield to an ambulance and for him to get back in his own car. Burbrink threatened to "slice Frodge from ear to ear" and grabbed Frodge's arm through the open window. He proceeded to start kicking the side of Pence's vehicle. Frodge got out and Burbrink rushed him. Frodge ducked. Pence got out at some point. Burbrink rushed Frodge again and Frodge struck him. Burbrink fell back, landing on Pence – who kicked him off her ankle.

Officer Markus and Simmons (Newport PD) were working an extra-duty detail at a nearby restaurant. They saw the fight and approached. Although they did not identify themselves verbally, they were in uniform. They had to physically separate Frodge and Burbrink, with Simmons striking Frodge with his expandable baton. They fell to the ground as Simmons attempted to arrest Frodge. Eventually both men were arrested and handcuffed.

[86] 471 U.S. 1 (1985).
[87] Frodge is with Covington Police Department.

While on the ground, Frodge explained he was an officer. He asked Markus to look at the side of the vehicle, and he did so, but later explained that despite the fact there was some damage, "he did not know how it got there." Pence was trying to explain what had happened but she later testified that she was told to "shut the F up." Ultimately, Pence was also arrested. (The officers asserted that she was "yelling and screaming.") Sgt. Kunkel, who arrived as backup, stated he tried to talk to Frodge and Pence about the force Simmons used, but they "refused to talk to him." He testified that "Frodge's eyes were bloodshot and that he could smell alcohol on" Frodge. Pence responded to his questions with profanities and kicking.

Both Frodge and Pence were charged with Disorderly Conduct, and were acquitted. They filed suit against the officers and the City of Newport, under 42 U.S.C. §1983. The officers moved for summary judgment, which was granted. The District Court agreed that Simmons had probable cause to arrest Frodge and Pence, as he had no objective evidence to support their claim of self-defense. The Court agreed that the use of the expandable baton was objectively reasonable to end the fight and take control of the situation. (The Court also dismissed the claim of tight handcuffing on Frodge's part, finding no indication that he complained that they were, in fact, too tight.) The Court agreed that no constitutional violation occurred and dismissed the Fourth Amendment claim. The Court also dismissed the case against Sgt. Kunkel and other supervisors, finding that since Simmons did not violate any rights, by extension, the claim of supervisory liability also failed. For the same reason, the case against the City of Newport failed.

Frodge and Pence appealed.

ISSUE: Is an officer required to continue seeking evidence once they have probable cause that an arrest is justified?

HOLDING: No

DISCUSSION: The Court looked first at the claims against Simmons. With respect to the false arrest claim, the Court noted that first, Frodge and Pence would need to prove that the officers lacked probable cause for the arrest. [88] The Court agreed that "probable cause is determined by the totality of the circumstances and from a reasonable law enforcement officer's on-scene perspective."[89] However, ""[o]nce probable cause is established, an officer is under no duty to investigate further or to look for additional evidence which may exculpate the accused."[90] But ""an officer cannot look only at the evidence of guilt while ignoring all exculpatory evidence. Rather, the officer must consider the totality of the circumstances, recognizing both the inculpatory *and* exculpatory evidence, before determining if he has probable cause to make an

[88] Criss v. City of Kent, 867 F.2d 259 (6th Cir. 1988).
[89] U.S v. Craig, 198 F. App'x 459 (6th Cir. 2006); Klein v. Long, 275 F.3d 544 (6th Cir. 2001). Fridley v. Horrighs, 291 F.3d 867 (6th Cir. 2002).
[90] Ahlers v. Schebil, 188 F.3d 365 (6th Cir. 1999).

arrest."[91] An affirmative defense does not "automatically vitiate probable cause," but an officer "may not ignore information know to him which proves that the suspect is protected by an affirmative legal justification." But, on the flip side, an affirmative defense does not mean that the officer lacks probable cause for the arrest.

After reviewing the facts, the Court agreed that Simmons had probable cause that Frodge and Pence were involved in disorderly conduct. Frodge and Pence contended that Simmons never asked for their side of the story and did not consider the damage to the car. However, even though they were aware of the claim by Pence, who wasn't arrested until later, they could not "conclusively know" it was a valid claim.

The Court noted that although the Covington Police Department, in an internal administrative review, determined the Frodge acted in self-defense, that "does not negate the probable cause finding made *at the scene* by the officers." The Court noted that "probable cause is determined by the totality of the circumstances and from a reasonable law enforcement officer's on-scene perspective." Anything that happened after the incident simply had "no bearing" on the decision to arrest.

With respect to Frodge's excessive force claims, the Court found no reason to find that Simmons's use of the baton was objectively unreasonable. Frodge argued that the fight was over when he was struck, but his own testimony did not support this assertion. The court noted that the "fight had not completely ended" when the strike occurred. Again, the Court quickly discounted the handcuff claim.

With respect to the supervisory liability claim, the Court noted that "a prerequisite of supervisory liability under §1983 is unconstitutional conduct by a subordinate of the supervisor."[92] Since it was decided that Simmons's did not violate their constitutional rights, the claim against the supervisors failed as a matter of law. With respect to the failure to train claim against Newport, the Court noted that Frodge and Pence did not explain how the training was inadequate and as such, that claim failed as well.

The Court upheld the dismissal of the federal and state law claims.

TRIAL PROCEDURE / EVIDENCE – CONFRONTATION CLAUSE

Conner v. Warren (Warden), 2012 WL 4840815 (6th Cir. Mich. 2012)

FACTS: At Conner's trial for murder and kidnapping, the Court allowed Conner's son to testify about "statements made to him by Conner's former husband, Tim, a non-testifying co-defendant, that implicated Conner." The son was wearing a wire at the time, although Tim did not know that. She was convicted of all three charges, but ultimately the kidnapping charge was dismissed and the two murder charges merged. Conner appealed.

[91] Gardenhire v. Schubert, 205 F.3d 303 (6th Cir. 2000).
[92] McQueen v. Beecher Cmty. Schools, 433 F.3d 460 (6th Cir. 2006),

ISSUE: Are statements made to a witness necessarily testimonial?

HOLDING: No

DISCUSSION: The court noted that the Confrontation Clause barred the admission of "testimonial statements of a witness who did not testify at trial unless he was unavailable to testify and the defendant had a prior opportunity for cross-examination."[93] In this case, because Tim was not aware that the son was working with law enforcement, his statements could not be considered testimonial.

Conner's conviction was upheld.

TRIAL PROCEDURE / EVIDENCE - TESTIMONY

Jones v. Bagley, 696 F.3d 475 (6th Cir. Mich. 2012)

FACTS: While being interrogated on a murder, Jones stated that he needed to "talk to an attorney before he answered any more questions." He had been given his Miranda rights but was not under arrest. At trial, the prosecutor was permitted to "elicit from the police witness the fact that the interrogation ended when Jones asked to speak with an attorney." The Court admonished the jury that anyone could decide to speak to an attorney and that it should not be understood as an admission of guilt. Following the trial, Jones also argued that four pieces of evidence were withheld from him.

Jones was convicted and appealed, first through the Ohio state court system, and then through the federal court system, via a habeas petition.

ISSUE: Is it proper to give testimony that indicates a person invoked their right to counsel?

HOLDING: No

DISCUSSION: The Court noted that each of the lower courts had ruled that it was improper for the prosecutor to elicit testimony suggested a subject had invoked their right to counsel, however, the Court agreed that it was harmless, given that the "judge gave curative instructions and the evidence against Jones was otherwise strong."

With respect to the withheld evidence, the Court noted that to make a case under Brady v. Maryland, it was necessary to show that 1) the evidence was favorable to Jones, 2) that the prosecutor withheld it and 3) that Jones suffered actual prejudice from it, meaning it was material to his conviction or his sentence. Because the Court agreed that in fact, most of the allegedly withheld evidence was not exculpatory, Jones failed to make the necessary showing. With respect to other evidence, which may have been exculpatory, the Court ruled that Jones was aware of the issue with the evidence and

[93] Davis v. Washington, 547 U.S. 813 (2006); Whorton v. Bockting, 549 U.S. 406 (2007).

could have pursued it at trial, if he chose to do so. Cumulatively, the Court concluded that there was no Brady violation.

Jones's conviction was affirmed.

EMPLOYMENT – DISCRIMINATION

Johnson v. Metro Nashville, 2012 WL 4945607 (6th Cir. Tenn. 2012)

FACTS: Prior to 2006, Metro Nashville PD (MNPD) promoted based strictly on standardized tests, a combination of a written exam and a performance assessment. The Chief was then required to promote based only on a composite score from the two evaluations. However, this method was criticized as not taking important criteria into consideration, such as "managerial skill and past performance." It was also believed to affect the promotion abilities of minority candidates, which was embedded in a larger concern about the diversity of the MNPD's upper ranks. In 2003, the police chief promoted early from a list that was due to expire, simply to be able to include several minority candidates. In 2004-2006, MNPD worked to change the policy. Following the change, the policy featured standardized tests, but also gave the police chief a "measure of discretion in deciding whom to promote." The composite score of the two standardized tests, however, would not be the entire score, with some leeway given to the chief, who is initially provided a list of the seven highest-scoring candidates for a position, in alphabetical order (rather than by test score). If the chief chose not to promote from that list, the chief was able to request a new roster with the next tier of seven candidates.

In 2006-07, vacancies became open for lieutenant and sergeant positions. Johnson and Moore applied for lieutenant, while Holley applied for sergeant. Each was passed over. In the case of the lieutenant's position, Johnson and Moore alleged that three female and two black male candidates who ranked lower were selected over them. (In addition, three white males who ranked lower were also promoted.) In Holley's case, he originally ranked 16th, but 29 promotions were made. He did not detail how many female and black candidates were promoted, but noted that only one black candidate scored higher than he did. Again, a number of white male candidates who ranked lower were promoted over Holley, as well.

The three Plaintiffs argued that the MNPD abused its discretion to favor promotions of minority candidates, noting several statements made to the newspaper which emphasized that the policy change was to increase the diversity. As part of the process, the Plaintiffs also addressed an anonymous survey that was used to assess candidates for the open positions, and which was used by the chief in the decision-making. Once the surveys were used, however, they were destroyed, which the Plaintiffs asserted was a violation of federal law and a breach of their discovery obligation. (The District Court denied a move for a default judgment or a negative inference, however.) The Chief saw only the "rollup" scores, and that information was provided in discovery. The Chief acknowledged that he was aware of the race and

gender of the candidates, from their personnel files, but that he did not use that in his decision-making. The Chief did say he promoted no one below a specific cutoff and all three of the Plaintiffs scored below that cutoff score.

All three Plaintiffs alleged that they were the victims of reverse discrimination, which was never investigated. They filed, separately, lawsuits under 42 U.S.C. §1983 and related claims under the EEOC. The EEOC gave them a right to sue. The cases were consolidated. The agency and agency defendants successfully moved for dismissal of the various claims and ultimately, in 2010, all claims were decided in favor of MNPD. The Court also assessed court costs against the Plaintiffs. The Plaintiffs appealed.

ISSUE: May the deliberate destruction of records justify a spoliation sanction?

HOLDING: Yes

DISCUSSION: First, the Plaintiffs argued that they were entitled to sanctions for the spoliation of evidence – the destruction of the actual raw survey data. The Court noted that a "proper spoliation sanction serves both fairness and punitive functions." The Court is given much discretion in the type of sanction it might order, based upon the following standard:

> [A] party seeking an adverse inference instruction based on the destruction of evidence must establish (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed "with a culpable state of mind;" and (3) that the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.[94]

The Plaintiffs argued that under the EEOC, employers are obligated to "preserve employment 'records.'" The Court agreed that the MNPD should have preserved the individual survey scores as they "were part of, and indeed played an integral role in, a significant change to an already controversial promotion system." It was "reasonably foreseeable" that they would face a challenge to the new promotion system from those who were passed over. By destroying the data, they lost an opportunity to defend the process and also deprived officers of valuable information on their individual performances as well as information useful in litigation. The Court agreed that under Title VII regulations, the employer was required to preserve the surveys,, as they are properly records under the statute. There was no convincing explanation as to why they failed to do so, as the MNPD agreed it was certainly possible to have saved the data. The District Court found no bad faith on the part of the MNPD, but the Court noted that bad faith is only relevant in a spoliation decision with respect to the sanction imposed. In this case, the "the record shows that [the Chief] deliberately chose not to preserve the

[94] Beaven v. U.S. Dep't of Justice, 622 F.3d 540 (6th Cir. 2010) (citing Adkins v.Wolever, 554 F.3d 650 (6th Cir. 2009) (en banc)).

results and deliberately ordered the destruction of the individual surveys." As such, the destruction was intentional.

However, the Court found no indication that the destroyed surveys were relevant in the claim of reverse discrimination, as they were a "rather blunt instrument" that only recorded numerical scores that would not reflect any improper motive. The record was unclear as to whether a particular survey could be attached to a the name of the person who took the survey, or whether they were truly anonymous. Because the Plaintiffs scored so much lower than those promoted, it was unlikely that the improper motives of a few supervisors skewed the results markedly. The Court agreed a spoliation sanction was unnecessary.

With respect to a disparate treatment claim, the Court noted that the Plaintiffs offered no direct evidence of discrimination. Memos, newspaper interviews based on hypotheticals and other documents were from several years removed from the promotions. Comments "reflecting a desire to improve diversity do not equate to direct evidence of unlawful discrimination."[95] Some of the statements were made by individuals who were not decisionmakers in the process. With respect to circumstantial evidence, the Court noted that the Plaintiffs' burden is to show "(1) that the Defendant 'is that unusual employer who discriminates against the majority;' (2) that they were qualified for the position in question; (3) that they suffered an adverse employment action when they were not promoted; and (4) that they were treated differently than other similarly situated employees."[96] Once the Plaintiff makes that case, it shifts the burden to MNPD to "show a legitimate, non-discriminatory reason behind their actions." At that point, the burden goes back to the Plaintiff to "prove that the stated explanation was a pretext for discrimination." Assessing the facts, the Court agreed that the Plaintiffs presented sufficient evidence to show "that there was ongoing racial tension" regarding promotions. The evidence showed that the upper command was "acutely conscious of its long history of racial and gender imbalance." The Court agreed that the Plaintiffs suffered an adverse action when passed over. The Court agreed they were qualified for promotion, by being placed on the roster, but noted that inclusion on the roster only qualified a candidate for promotion, it did not guarantee it. The Court, however, noted that the Plaintiffs had "made no effort whatsoever to show that they were similarly situated to the chosen candidates on even the most basic level." This "utter failure" … "fatally undercuts" their case. The results of the survey indicated that they were, in fact, dissimilar from those promoted and they all fell below the Chief's imposed bottom score, as well.

The Court affirmed the decision of the District Court.

[95] Plumb v. Potter, 212 F. App'x 472 (6th Cir. 2007).
[96] Arendale v. City of Memphis, 519 F.3d 587 (6th Cir. 2008).

EMPLOYMENT – FIRST AMENDMENT

Buchko v. County of Monroe (Sheriff), 2012 WL 5896550 (6th Cir. Mich. 2012)

FACTS: Buchko was a member of the Monroe County (MI) Sheriff's Office. He tested for a sergeant's position in 2003. Under their collective bargaining agreement, the Sheriff would use the test scores and "sheriff's points" to determine who will be promoted. Buchko did not test well enough to place in the top two at that time. In 2004, he was elected to the Monroe Public School Board of Election and was a "school liaison." In 2005 he tested again, and was ranked second on the list. In 2006, while the list was still in effect, Sheriff Crutchfield passed over Buchko for a slot as the K-9 supervisor, in favor of the deputy who was ranked third. The Sheriff justified the decision by saying that the deputy was a K-9 handler. Buchko was troubled, but did not have any specific criticism of the other deputy's ability to do the job.

Buchko, however, believed that the decision was based on votes he made as a member of the school board and he filed an unsuccessful grievance. In 2008, he began working on the campaign of a fellow deputy who was running against Sheriff Crutchfield. He later acknowledged that he criticized the Sheriff privately, but never publicly. He claimed that Sheriff Crutchfield retaliated, however, by changing his work schedule and assignments. Emails were sent to him, as a member of the Sheriff's Office, that he argued were threatening to his work life, emphasizing the need for loyalty. Sheriff Crutchfield won the election. In January, 2009, Buchko was again passed over for promotion by someone who ranked lower than he did on the list. Again a grievance was denied and Buchko filed suit against Monroe County and the Sheriff under 42 U.S.C. §1983. The Sheriff and the county moved for and received summary judgment, dismissing the case, and Buchko appealed.

ISSUE: Must a nexus be proved between protected speech and retaliatory actions?

HOLDING: Yes

DISCUSSION: To succeed in a First Amendment case, the Court noted that Buchko must prove three elements; that he "(1) engaged in constitutionally protected conduct; (2) an adverse action was taken against [him] that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) the adverse action was motivated at least in part by [Buchko's] protected conduct." In this case, the parties agreed that he satisfied the first two elements, the only issue in dispute was whether the failure to promote was "based at least in part on [Buchko's] protected activity." The Court conclude that Buchko did not make a sufficient showing that the Sheriff bypassing him was due to retaliation. The Court noted that his "minimal evidence is purely speculative and he is required to 'point to specific, nonconclusory allegations reasonably linking [his] speech to employer discipline." [97] The evidence he presented

[97] Vereecke v. Huron Valley Sch. Dist., 609 F.3d 392 (6th Cir. 2010).

was, at best, indirect, and linked only to a statement made by someone (the union president) other than the Sheriff.

The Court noted that there was a lengthy time between the "first alleged protected activity and the alleged adverse employment action," 29 months, and between the second, 12 months. However, the Court agreed that it should look beyond mere "temporal proximity," but still found no link between the two. Further, the Court found valid reasons for the Sheriff's decision to bypass Buchko, as the selected candidates had "skill set[s] and experience" that Buchko lacked.

The Court affirmed the decision to give summary judgment to the Sheriff and the County.